To be Argued by
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Office Supreme Court,
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WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 111

THE UNITED STATES OF AMERICA, ex rel. EMANUEL VAJTAUER,

Appellant,

against

COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK,

Respondent.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

THE UNITED STATES OF AMERICA ex rel. EMANUEL VAJTAUER,

Appellant,

vs.

THE COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK,

Respondent.

BRIEF FOR APPELLANT.

The case presents to this court a novel question,—the construction of Section 23 of the Immigration Act of 1924 imposing, for certain purposes, the burden of proof upon the alien in deportation proceedings.

Opinion of the Court Below.

The opinion of the District Court has not been officially reported; it appears in the record at pages 29-30.* Judge A. N. Hand dismissed the writ squarely upon the ground that the alien had failed to sustain the burden of proof imposed upon him by Section 23 of the Immigration Act of 1924.

*For the opinion of the Board of Review see R., 24-26.

The Grounds on Which the Jurisdiction of this Court is Invoked.

The judgment and the order allowing the appeal were both filed April 23, 1925 (R., 31, 34), before the recent amendment of the Judiciary Act went into effect (May 13, 1925). The jurisdiction of this Court is invoked upon the ground that the issues involve the construction and application of the Constitution of the United States.

The alien claimed in the District Court that he was denied the rights guaranteed him by the Fourth and Fifth Amendments in that his failure to answer incriminating questions was construed as an admission by the Labor Department (Traverse, Par. 6, R., 8—Assignments of Error, Eighth and Ninth, R., 33), and in that the arrest and subsequent hearings were unfair and were not conducted as prescribed by the rules of the Labor Department (Traverse, Pars. 2, 3 and 4, R., 7—Assignments of Error, Fifteenth-Seventeenth, R., 34).

The District Court, as we have said, upheld the deportation upon the sole ground that the alien had not, in view of the construction which it gave to Section 23, sustained the burden upon him of showing that his entry was "lawful." Relator contends that the District Court thereby denied him due process of law (2nd Assignment of Error, R., 32) by the broad construction which it thus gave to the burden of proof provision (7th Assignment of Error, R., 33) and by consequently sustaining the deportation warrant upon a ground not included in the Labor Department's findings (4th Assignment of Error, R., 33).

Statutory Provisions Under Which the Jurisdiction of this Court is Invoked.

The jurisdiction of this court is invoked under Judicial Code, Section 238 as it was at the time the appeal was

filed (36 Stat., 1157 as amended 38 Stat., 804). (The amendment enacted February 13, 1925 which went into effect May 13, 1925 specifically provided that it should not affect pending appeals [Sec. 14, see 266 U. S., 686, 696].)

Cases Relied Upon to Sustain the Jurisdiction of this Court.

Bilokumsky vs. *Tod*, 263 U. S., 149;
Tisi vs. *Tod*, 264 U. S., 131;
Mahler vs. *Eby*, 264 U. S., 32;

• • • • • •

Bailey vs. *Alabama*, 219 U. S., 219;
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Statement of the Case.

This is a direct appeal from a judgment of the District Court for the Southern District of New York dismissing a writ of habeas corpus and remanding the relator to the custody of the Labor Department for deportation (R., 31-34). The relator who has taken out his first papers (R., 14) is the subject of expulsion to Czecho-Slovakia under a warrant issued November 28, 1924, charging that he has been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920 (R., 27).

It was an annonymous letter signed "A Union Man" that set the deportation proceedings in motion (District Court opinion, R., 29; Return, R., 4: Report of Board of Review, R., 24).

Vajtauer's Entry Into the United States.

The facts (to use the language of Section 23) as to the "time, place, and manner" of Vajtauer's entry—and as

to the lawfulness of that entry—are undisputed. Vajtauer came to this country on the "Minnekahda," December 1, 1923 (Record of entry, R., 10; Return, R., 6; warrant of arrest, R., 11; warrant of deportation, R., 27), and was "admitted" by the immigration authorities four days later (Record of entry, R., 10).

Warrant of Arrest.

The charges contained in the warrant of arrest (R., 11-12)—the same charges that were subsequently embodied in the warrant of deportation (R., 27)—are thus summarized in the opinion of the District Court (R., 29). Vajtauer, the warrant charges,

> "(1) believed in and advised the overthrow of the government of the United States;
>
> (2) wrote, published or had in his possession for circulation written or printed matter advocating opposition to all organized government;
>
> (3) wrote, published or had in his possession for circulation written or printed matter advocating the overthrow by force and violence of the government of the United States."

Hearing of May 14, 1924.

Vajtauer answered certain routine questions (R., 12-14). His attorney then advised him "not to answer any further questions until the evidence upon which the warrant is based will be presented here" (R., 15), and the attorney repeated this advice (R., 16, 17, 18). Vajtauer said he would "go by" his "attorney's advice" (R., 15) and answered nothing further.

The government introduced certain exhibits in evidence—to all of which objection was taken (R., 15, 17):

(1) Exhibit A—a 46-page pamphlet in a foreign language (R., 18), "with the name of Dr. E. M. Vajtauer." The interpreter, Dianish, described "this pamphlet" as "merely a study of the Russian revolution. It was written in 1920 and deals with the problem of the Russian people who overthrew the Government of the Romanoffs and established the Communist government over there" (R., 15).

(2) Eight extracts (R., 18-20) purporting to have been translated from the foregoing. The interpreter stated that he had translated "portions of that pamphlet" and that the exhibit introduced was "only extracts" of the translation made by him and that he was "familiar with the language in which this pamphlet is written" (R., 15).

(3) Exhibit "B"—a report purporting to be a summary of a speech "made by Dr. Vajtauer on March 21, 1924 at 'Spraveldvost' Hall." It is referred to as a "translation made by a competent interpreter" (R., 17), but shows on its face that it is a report or summary and not a translation (R., 20) and it is so described by the Board of Review (R., 26).*

• • • • • •

The questions which, upon advice of counsel, the relator refused to answer follow:

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*There is some confusion about the numbering of these exhibits. The eight extracts listed as "2" above are sometimes referred to as Exhibit "B" (R., 15), though in fact the original instrument in the foreign language and the extracts were introduced as one Exhibit "A" (R., 15).

"Why did you come to the United States?"

"Is that your name on the head of the pamphlet?" (Exhibit "A," R., 15).

Certain of the translated excerpts from Exhibit A were read to Vajtauer (R., 16) and as to each he was asked:

"Are you the author of that passage?" (R., 15).

And further:

"Did you deliver a speech at the 'Spravedlvost' Hall at a meeting held on March 21, 1924, in Chicago?" (R., 17).

Inspector Paul (R., 17-18) read to the alien a statement "purporting to have been made by the respondent, Dr. Vajtauer, Czecho-Slovakia," from an abridged report of the Fourth Congress of the Communist International held at Petrograd and Moscow, Nov. 7, Dec. 3, 1922, and inquired:

"Are you the author of these remarks at the Convention held at Moscow?" (R., 18).

"Do you belong to the Communist Party?" (R., 18).

Hearing August 27, 1924.

No testimony was given at this hearing (R., 22). Inspector Paul read Section 23 of the Immigration Act of 1924 (quoted at page 11, infra) and asked Vajtauer's lawyer, Mr. Holland, if he wished to place the alien under oath and the attorney said he did not. According to Mr. Paul's statement the "passport of the alien is introduced in evidence and made a part of the record of this hearing" (R., 22). His attorney asked

> "that any affidavits or documents that may be in the possession of the Department of Labor, in connection with the entry of the alien to the United States, may be made a part of this record, if there are any,"

to which Inspector Paul replied:

> "If there are such documents, and I am of the opinion that there are not any such documents, he having entered the United States prior to the 1st of July, 1924, the request shall be complied with."

• • • • • • •

The foregoing summarizes the whole record. That record shows its own incompleteness and the efforts of the alien's attorneys to complete it. The passport is missing altogether. Of the anonymous letter from "a union man" only a copy appears (R., 9-10). Exhibit "A," the 46-page pamphlet in a foreign language was "inadvertently overlooked when the file was certified for use in habeas corpus proceedings" (R., 28), as the Assistant Secretary of Labor remarks in writing to the Attorney General. It was upon the relator's insistence that the exhibit was finally inserted in the record. [See letter of Mr. Buckner to Judge Hand and the reference therein contained to "certain exhibits which were before the Department of Labor and which were not attached to the respondent's return" (R., 28-29).]

Assignments of Error.

The 17 assignments of error appear in the Record at pages 32-34. We rely upon all except the tenth.

Summary of Argument.

Our contentions are:

(1) That the District Court plainly misconceived the effect of Section 23 of the Immigration Act of 1924. The burden of proof there imposed upon the alien is confined to matters affecting the regularity of the entry as such —its "lawfulness" in the respects of "time," "place," and "manner." There is no burden upon him to show that at the time of entry he was not a member of the excluded classes. This construction is established by a consideration of the section standing alone, of its relation to other provisions of the Act of 1924 and other immigration acts, of the evil which the section was designed to correct and of the debates which preceded its passage in the two houses of Congress;

(2) That the District Court, proceeding on this erroneous construction of Section 23, sustained the deportation upon a ground not included in the Labor Department findings;

(3) That the construction of Section 23 adopted by Judge Hand was manifestly erroneous in its application to Vajtauer. Vajtauer came in before May 26, 1924. With respect to such an immigrant the Labor Department admittedly had no records that could enable him to show that at the time of entry he was not a member of an excluded class;

(4) That Vajtauer discharged the burden of proof even on the erroneously broad construction which Judge Hand gave to Section 23 of the Act of 1924;

(5) That the Labor Department committed error of law in the scope, meaning and application given to the

decision of this court in Bilokumsky vs. Tod (263 U. S., 149), and the District Court similarly committed error of law in its construction of that opinion;

(6) That there was no evidence to sustain the findings in the warrant of deportation;

(7) That the proceedings were unfair in all the following respects: the rules of the Labor Department were violated; documents were received in a foreign language and in the form of scattered excerpts; the record is incomplete.

POINT I.

The District Court plainly misconceived the effect of Section 23 of the Immigration Act of 1924. The burden of proof there imposed upon the alien is confined to matters affecting the regularity of the entry as such—its "lawfulness" in the respects of "time," "place" and "manner." There is no burden upon him to show that at the time of entry he was not a member of the excluded classes. This construction is established by a consideration of the section standing alone, of its relation to other provisions of the Act of 1924 and other Immigration Acts, of the evil which the section was designed to correct and of the debates which preceded its passage in the two Houses of Congress.*

It was solely by reason of his construction of Section 23 that Judge Hand sustained the order of deportation. Judge Hand said:

> "He has the burden of showing that he entered the United States lawfully; that burden was not met when he refused to be examined; we do not know what the examination might have disclosed, but a refusal to furnish any evidence for whatever reason, and a reliance solely on his passport, does not meet the burden of proof or require the government to go further.
>
> It is to be remembered that he is the respondent in a deportation proceeding in which he had the burden of showing that he was not among the excluded classes" (R., 30).

• • • • • • •

Section 23 of the Immigration Act of 1924 provides:

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*See Assignments of Error, second-seventh (R., 32-33).

> "Whenever any alien attempts to enter the United States, the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully and the time, place and manner of such entry into the United States, but in presenting such proof, he shall be entitled to the production of his immigration visa, if any, and of any other documents concerning such entry in the custody of the Department of Labor."

The plain intent of the burden of proof provision as to deportation proceedings is, we submit, that the burden was put upon the alien of showing merely that he complied with the requirements of law applicable to the mechanics of entry. He was called upon to prove—and the documents were made available to him that would enable him to prove—those facts of "time" and "place" and "manner" which would readily establish that he was not smuggled into the country but came in "lawfully." That this and this only was the meaning of this provision, a series of considerations drawn from the language of the section standing by itself, from its relation to other sections and other statutes, from an examination of the evil which it was designed to correct and from the legislative proceedings all establish:

The Language of Section 23 Standing Alone.

A.

The contrast between the burden of proof provisions applicable to proceedings upon the entry of an immigrant and to deportation proceedings is illuminating. Upon the

foreigner who comes to this country Section 23 imposes a general burden of establishing "that he is not subject to exclusion under any provision of the Immigration Laws." Section 23 imposes no such burden upon one already in the country and threatened with deportation. His duty is simply "to show that he entered the United States lawfully and the time, place and manner of such entry."

The construction which Judge Hand gave to Section 23 in its relation to deportation proceedings imposes the same burden upon an alien who may have been here many years as upon an immigrant. In the case at bar Judge Hand held for Vajtauer's deportation because he had not discharged the burden of showing that he was at the time of entry "not among the excluded classes" (R., 30).

This construction would make it possible to deport any alien upon a warrant which charges that at the time of entry he was "a member of" all "the classes excluded by law" (Section 19, Act of Feb. 5, 1917), unless such an alien, years after the event, could affirmatively establish that at the time of entry he had not been—to take a few random examples—a lunatic, an epileptic, a person "afflicted with constitutional psychopathic inferiority," a trafficker in prostitution, a professional beggar, a vagrant, a person afflicted with tuberculosis, etc., etc. (Act. of Feb. 5, 1917, Sec. 3).

We have said that the construction which Judge Hand gave to the burden of proof provision imposes the same burden in deportation proceedings as in exclusion proceedings, although the perfectly clear intent of the statute was to draw a distinction between the two sets of proceedings and to show a greater leniency to the alien actually in the country and threatened with eviction than toward the alien seeking to enter it. In truth Judge Hand's construction imposes a greater burden

upon the deportee than upon the immigrant. For the immigrant has the burden of showing *at the time* that he does not belong to any of the excluded classes; the deportee would have the burden of showing that *years before* he had not been in any one of a large number of respects inferior.

B.

The argument is reinforced when the obligation imposed upon the deportee is considered in its relation to that provision which is inserted to enable him to discharge that burden. Section 23—after saying that "the burden of proof shall be upon such alien to show that he entered the United States lawfully and the time, place and manner of such entry into the United States"—goes on to balance that provision with another (significantly introduced by a "but") whose purpose it is to enable the alien to show these things. "But in presenting such proof," the statute proceeds, "he shall be entitled to the production of his immigration visa, if any, and of any other documents concerning such entry in the custody of the Department of Labor."

This provision is by its express language limited to "entry" and to documents concerning "entry." There can be no "documents concerning" anything but the lawfulness of the mechanics of entry—the *lawful* quality of the "time, place and manner." There will be documents in the Labor Department, as in Vajtauer's case there were (R., 10), showing when and where and on what ship he came in and by what immigration officials he was passed. There are and can be no documents in the case of Vajtauer or of other immigrants before July 1, 1924, showing that they had not been before the time of entry communists or anarchists or professional beggars or vagrants, etc.

The Evil that the Deportation Provision of Section 23 was Designed to Meet.

The evil that Section 23 was designed to meet was the smuggling of aliens unlawfully into the United States. "The testimony before the committee shows, and the Secretary of Labor has said, that within the last year alone over 300,000 men had entered the United States unlawfully," declared Mr. Raker in the House of Representatives (and see generally Appendix, pages 14-15).

"The provisions of this [1924] Act are in addition to and not in substitution for the provisions of the immigration laws and shall be enforced as a part of such laws" (1924 Stat., Sec. 25, see Appendix, page 34). Section 19 of the 1917 Act provides for deportations. We quote in the Appendix the whole of Section 19. It is under the following provision that aliens who have been smuggled into the United States are deported:

> "At any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

The Court will at once observe the close connection between the language of this section and the language of Section 23 of the Act of 1924. The section we have quoted from the 1917 Act refers to "time" and to "place" in the same words employed in Section 23. The "manner" of entry is defined by reference to "by water

* * * or by land." One enters unlawfully if one enters "without inspection."*

The Amendment of Section 23 in the Course of Its Passage Through Congress.

We have set forth in full in the Appendix the debates in both houses on Section 23. The legislative history is, broadly speaking, identical. As originally reported by the Committee on Immigration of the House of Representatives, Section 23 consisted of a single provision applicable to both immigration and deportation proceedings, putting upon any "individual" the burden of proving his right to "enter or remain in the United States" (See Appendix, page 1). In the Committee of the Whole a committee amendment was agreed to substituting for "individual" the word "alien." The Senate Committee made the same change before reporting the bill (Appendix, page 18).

Even in this form the proposal in its application to the precise case of deportation proceedings aroused wide opposition. Hearings were had and oral arguments made and briefs submitted pointing out the oppressive and perhaps unconstitutional effect of a general burden of proof provision in its relation to persons once in the country. The measure was, however, reported in a form which imposed upon every alien the same general burden of proof in both immigration and deportation proceedings.

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*The Quota Law of 1924—of which Section 23 is a part—added the requirement (compare the provisions of Sections 2, 3, 4, 13 and 14, quoted in the Appendix, pages 26-32) that immigrants, except non-quota immigrants, should be in possession of an unexpired immigration visa. These provisions are reflected in the reference in Section 23 to the "immigration visa" as one of the documents to which the alien in discharging his burden of proof shall be entitled.

Mr. Begg moved in the House to amend the proposed section to the form that it now has. Criticizing its then form, he said:

> "Such a procedure, I will submit to all, is contrary to the practice and the basic principles of the United States in guaranteeing everybody, when accused of any crime, the right of the supposition of innocence until they are proven guilty.
>
> If my amendment is adopted, the provision does not apply to residents here but applies to men outside the gates. When they want to get in then it is up to them to prove that they are fit to be admitted" (Appendix, page 3).

Mr. Mills argued in support of Mr. Begg's amendment:

> "A man comes here lawfully under this law, complies with every provision of this law, is lawfully admitted, and four years later or four and a half years later some personal enemy makes specific charges against him that he has committed, let us say, a felony 10 years before in the country of his origin. Now, as a practical matter, how is that unfortunate individual going to submit affirmative proof that he was not guilty of such a crime as would exclude him?" (Appendix, page 11).

See also for an emphatic statement, enthusiastically greeted, Appendix, page 12.

The effect of the amendment was perfectly understood by its opponents. Mr. Newton of Minnesota, "rising in

opposition" to the amendment, pointed out that as reported "Section 23 puts the burden of proof upon the alien 'in any proceeding under the immigration laws' as to both his entry and remaining in the United States." Referring to Mr. Begg's amendment Mr. Newton said:

> "The gentleman from Ohio moved to amend by striking out Section 23 and inserting in lieu a provision which retains only the provision as applied to the right to enter" (Appendix, page 9).

Mr. Begg's amendment was adopted by a vote of 140 to 131 (Appendix, page 17).

The same change was adopted in the Senate, with discussion but without disagreement (Appendix, page 18).

Senator Reed of Pennsylvania, after remarking that "the bill as reported from the committee provides that in any proceedings under the immigration laws the burden of proving the right to admission here shall be on the alien," said, "That is a little bit too broad. It seems to me the provision in the bill as it passed the House is very much better, and therefore, I propose the following amendment."

Senator Norris asked Senator Reed with regard to the meaning of the amendment and said:

> "If we are going to deport anybody, we must not put the burden of proof on him to show that he ought not to be deported. Does this amendment provide that in case the Government of the United States desires to deport an alien who is a resident of the United States the burden of proof shall be on the alien?"

Senator Reed replied:

> "The bill as reported from the committee does just that and we thought it was unfair. So we propose

> to change it by this amendment so as to provide in deportation proceedings the burden of proof shall be on the alien to show that he entered lawfully. Then the burden of proof would shift to the Government."

In reply to a further statement by Senator Norris, Senator Reed repeated: "That is the exact effect of it." Immediately thereafter the amendment was adopted.

• • • • • • •

Viewed in the light of its own language and of its legislative history, the meaning of Section 23 is then, we submit, wholly clear. But if doubt there could be, the result must, nevertheless, be the same. Manifestly (to put the case mildly) the construction Judge Hand adopted would raise the most serious constitutional difficulties (compare 7th Assignment of Error, R., 33). Judge Hand's ruling was that once the mere fact of alienage is established, a general presumption of unlawful entry arises. This presumption is not limited to specific facts of time, and place and circumstance as to which the alien is given the means to rebut the presumption. It is a general presumption that he was at the time of entry a member of an excluded class.

The limits upon the power of legislative bodies, consistently with the due process principle, to establish presumptions, have been repeatedly defined by this Court. A legislative body may in general shift the burden of proof. A statute "must" not, however, "under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed" (*Mobile, etc., R. R. Co.* vs. *Turnipseed,* 219 U. S., 35, 43).

To the same effect see:

Hawse vs. *Georgia,* 258 U. S., 1;
Luria vs. *U. S.,* 231 U. S., 9.

And "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption" (*Bailey* vs. *Alabama*, 219 U. S., 219, 239; see also *Truax* vs. *Corrigan*, 257 U. S., 312, 324).

To the same effect see *McFarland* vs. *American Sugar Co.* (241 U. S., 79, 86).

It is in the light of these principles that the construction of Section 23 of the Act of 1924 is to be determined. If—and only if—the burden of proof in deportation proceedings is limited to facts which can be shown by documents made available to the alien, it is competent for Congress to impose upon him the burden of proof (compare *Mobile, etc., R. R. Co.* vs. *Turnipseed*, supra). Upon precisely this ground statutes have been sustained by this Court which at one and the same time provided generally that Chinese should be excluded from the United States; that such Chinese as were lawfully admitted should be given certificates of residence, and that in default of the presentation of such a certificate a Chinese person might be deported (*Fong Yue Ting* vs. *U. S.*, 149 U. S., 698, 729; *Li Sing* vs. *U. S.*, 180 U. S., 486, 493).

The statute as construed by Judge Hand is subject to the precise constitutional objection from which the Chinese acts were free: There is and can be no material available to the alien to rebut the general presumption which the logic of Judge Hand's ruling imposes upon him. This objection is rendered the graver by the circumstance that with respect to an alien of the white race the deportation proceeding is and from the beginning has been "throughout executive in its nature" (*Ng Fung Ho* vs. *White*, 259 U. S., 276, 284).

To the present argument, an argument upon the construction of Section 23, it is not essential to establish—what we believe to be the fact—that the construction adopted by Judge Hand would render the burden of

proof provision of Section 23 in its relation to deportation cases constitutionally void. It is enough that that construction would raise most serious constitutional questions. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," this Court's "duty" in Mr. Justice White's language is "to adopt the latter" (*U. S.* vs. *Del. & H. Co.*, 213 U. S., 366, 408).

Cogent in any case, these considerations are most cogent in the case at bar. It was precisely in order to avoid the "challenge from a constitutional standpoint" that Mr. Johnson of Washington, the Chairman of the Immigration Committee of the House and the author of the bill, accepted the amendment which gave the statute its form and character (Appendix, page 5).

POINT II.

The District Court, proceeding upon its erroneous construction of Section 23, sustained the deportation upon a ground not included in the Labor Department's findings.*

Judge Hand, as we have seen, upheld the warrant of deportation upon the ground that Vajtauer had not sustained the burden of showing that he entered the United States lawfully. Judge Hand came to this conclusion because he misconceived the effect of Section 23 and gave to that section a much broader construction than Congress intended. We have remarked (supra, page 14) that as matter of procedure a charge of unlawful entry is entirely different from a charge of membership in an excluded class at the time of entry. This must be so if for no other reason than because of the fact that one may be deported by reason of membership at the time of entry in an excluded class even though he came in at a time when such entry was on no possible construction unlawful but when on the contrary there was no provision of law against the admission of members of such a class. The very statute under which Vajtauer has been ordered deported makes the point of law here involved. The Act of October 16, 1918, as amended by the Act of June 5, 1920 (Appendix, page 23), providing for the deportation of aliens holding proscribed beliefs, declares in so many words that "the provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States."**

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*See thirteenth, fourteenth and fourth assignments of error (R., 33-4).

**The Court will recall that the first statute excluding immigrants on the ground of any political belief, the anti-anarchist statute, was passed in 1903 (March 3, 1903, Ch. 1012, 32 Stat. 1213).

No charge of unlawful entry was made in any stage of the proceedings. The warrant of arrest and the warrant of deportation are "to be construed *in pari materia*" (*Mahler* vs. *Eby*, 264 U. S., 32, 43). This is true on general principle and manifestly true in the case at bar where the charges in the warrant of arrest and the findings in the warrant of deportation are verbally identical. Neither makes any reference to unlawful entry.*

The rules of the Labor Department of 1924, which were in effect throughout the hearings, provide:

> "If during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien shall be notified that such additional charge will be placed against him, and he shall be given an opportunity to show cause why he should not be deported therefor" (Appendix, page 40).

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*The warrant of arrest makes the following charges against Vajtauer (R., 11-12):

> "That prior to or at the time of his entry he believed in, advised, advocated, or taught the overthrow by force or violence of the government of the United States or of all forms of law; that prior to or at the time of his entry he wrote, published, or caused to be written or published, or who knowingly circulated, distributed, printed or displayed or who knowingly had in his possession for the purpose of circulation, distribution, publication, or display, written or printed matter, advising, advocating or teaching opposition to all organized government; and that prior to or at the time of his entry he wrote, published, or caused to be written or published, or who knowingly circulated, distributed, printed or displayed, or who knowingly caused to be circulated, distributed, printed, published or displayed, or who knowingly had in his possession for the purpose of circulation, distribution, publication, or display, written or printed matter, advising, advocating, or teaching the overthrow by force or violence of the Government of the United States or of all forms of law."

For the warrant of deportation see R., 27.

No such notification was in fact given at any time and no new charge was made. Inspector Paul did indeed read Section 23 at the second hearing (R., 22). But when the passport was introduced, no issue was raised of the legality of the entry.

Judge Hand on the contrary—while discrediting the Labor Department's findings upon the evidence presented (R., 30)—sustained the warrant upon the ground that the alien had failed affirmatively to establish the lawfulness of his entry. When Judge Hand did this, he in reality sustained the writ upon a charge not made and not included in the findings of the Labor Department. It is a settled general principle that a court may not support an administrative decision upon a ground not contained therein (*Wichita RR. & Light Co.* vs. *Public Utilities Commission*, 260 U. S., 48, 59). And so this Court in the precise case of deportation proceedings has lately decided (*Mahler* vs. *Eby*, 264 U. S., 32):

> "Does this omission invalidate the warrant? The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act" (264 U. S., at page 44).

POINT III.

The construction of Section 23 adopted by Judge Hand was manifestly erroneous in its application to Vajtauer. Vajtauer came in before May 26, 1924. With respect to such an immigrant the Labor Department admittedly had no records that could enable him to show that at the time of entry he was not a member of an excluded class.*

We have argued the construction of the burden of proof provision and what we conceive to be Judge Hand's error in connection therewith upon broad grounds applicable to any immigrant. The burden of proof provision, we have contended, is concerned with the mechanics of entry alone, with the unlawfulness of entry as such.

If, however, that construction could ever be accepted, it at least must fail in its relation to any immigrant who came in before May 26, 1924 (Sec. 31, Appendix, page 34). Section 7 of the Act of 1924 did for the first time import into the immigration laws of the United States a provision for records which would tend to establish that an immigrant thereafter admitted was not at the time of entry a member of an excluded class. His application for an immigration visa was to contain a statement by the immigrant "whether or not he is a member of each class of individuals excluded from admission to the United States under the immigration laws" (Sec. 7 [d]). The application was to be in duplicate, one copy to "become the immigration visa" (Sec. 7 [f]) and the visa to be "transmitted forthwith by the immigration officer in charge at the port of inspection to the Department of Labor under regulations prescribed by the Secretary of Labor" (Sec. 2 [e], Appendix, page

*See Seventh Assignment of Error and latter part of Sixth Assignment of Error (R., 33).

27). It was this very immigration visa—an immigration visa which after the new Act went into effect would contain an affirmative showing that the immigrant had not been at the time of entry a member of any one of the excluded classes—that Section 23 made available to an alien *entering after the new law went into effect.*

That the burden of proof provision could on no possible theory have been intended to apply and could not constitutionally apply to Vajtauer's case the following facts make clear:

Vajtauer came to the United States in December, 1923 (R., 10). Deportation proceedings were instituted against him in April, 1924, before the Act of 1924 had gone into effect or had even been passed (May 26, 1924). The first hearing—the only hearing at which the Government introduced any evidence—was on May 14, 1924 (R., 12), still before the Act had even been passed.

At the second hearing in August, 1924, the relator's attorney—in response to a request made at the first hearing (R., 4)—introduced the relator's passport (R., 22). He did this in precise connection with the newly enacted burden of proof section. (The records of time, place and manner of entry had been a part of the Labor Department's records in the matter since March [R., 10], before even the warrant of arrest issued.) The relator's attorney, Holland, then asked Inspector Paul (R., 22) "that any affidavits or documents that may be in the possession of the Department of Labor, in connection with the entry of the alien to the United States, may be made a part of this record, if there are any." Inspector Paul replied:

> "If there are such documents, *and I am of the opinion that there are not any such documents, he having entered the United States prior to the* 1*st of July,* 1924, the request shall be complied with."

POINT IV.

Vajtauer discharged the burden of proof even on the erroneously broad construction which Judge Hand gave to Section 23 of the Act of 1924.*

We have thus far argued that Judge Hand was wrong in his construction of Section 23 and most clearly wrong in his construction of that section as applied to Vajtauer's case. Assume for the purpose of the argument that his construction was correct. Whatever the burden that Section 23 imposes, Vajtauer discharged that burden.

Judge Hand, even if you accept his construction of Section 23, was in plain error as to the effect of the evidence,—as the following extract from his opinion establishes (R., 30):

> "He has the burden of showing that he entered the United States lawfully; that burden was not met when he refused to be examined; we do not know what the examination might have disclosed, but a refusal to furnish any evidence for whatever reason, and a reliance solely on his passport, does not meet the burden of proof or require the government to go further."

There was no "reliance solely on his passport." The following appears as a part of the record (R., 10):

> "98905-244 (2050-385).
>
> Ellis Island, N. Y. H., March 4, 1924.
>
> District Director, U. S. Immigration Service, Chicago, Ill.:

*The Third Assignment of Error, while perhaps not phrased with technical precision, plainly makes the point that the Court "erred in holding" that there was not "sufficient evidence to meet the burden."

I hereby certify that the following is a correct record and statement of facts relative to the admission to the United States of the alien named below:

(1) S.S. Minnekahda; line, White Star;

(2) Date arrival, December 1, 1923; manifest No. 3-30; Class III;

(3) Port at which admitted, New York, N. Y. Antwerp;

(4) Name, Emanuel Vajtauer; age 31; sex, M.;

(5) Married, M; occupation, Redact; able to read and write, yes;

(6) Native of Czechoslovakia; race Slovak;

(7) Last permanent residence, Prag., Czechoslovakia; father, Filip Vajtauer; Jundric at Praq. Luv.

(8) Destination, Seacaucus, N. J.;

(9) By whom passage paid, self; money brought, $80;

(10) Whether in U. S. before, No; when, ...; where, ...

(11) To whom going, Cousin, Dr. Jaroslav Hulba, c/o Tuberculosis Hospital, Seacaucus, N. J.; condition of health;

(12) Height, 5′ 6″; complexion, fair; color of hair, Dark;

(13) Color of eyes, Blue; identification mark, Limping;

(14) Place of birth, Tabor, Czechoslovakia; examined by Inspector Flannery;

(15) How admitted, S. I. #6; accompanied by .....

(16) Remarks: Admitted December 5, 1923—36—JJM. (Signature:) For the Commissioner, Wm. Flunn (Official title:) Chief of Record Division."

POINT V.

The Labor Department committed error of law in the scope, meaning and application given to the decision of this Court in Bilokumsky vs. Tod (263 U. S., 149), and the District Court similarly committed error of law in its construction of that opinion.*

Where it appears upon the face of the proceedings that the Department of Labor has committed error of law, which has entered into its decision, the *habeas corpus* writ must be sustained (*Gegiow* vs. *Uhl*, 239 U. S., 3, see especially page 9). In the case at bar this does appear. The following extract shows both the ruling and the error which induced it (R., 25-26):

> "The refusal of the alien to answer, at the advice of his attorney, does not prevent the alien's deportation under the charges made in the warrant. The U. S. Supreme Court in the case of *Bilokumsky* vs. *Todd*, 263 U. S., page 149 says: 'Conduct which forms the basis for inference is evidence. Silence is often evidence of the most persuasive character.'
>
> The record in this case clearly shows that this man is an alien. In view of his refusal to answer the questions propounded to him in order to show cause why he should not be deported, it *must be* taken for granted that the alien is the author of the passages quoted." (Our italics.)

And Judge Hand agreed that if the relator was "without justification" in his refusal to answer

> "then there is some basis for the finding of the Department that the relator was the author of the

*See ninth, eleventh and twelfth Assignments of Error (R., 33), and as to error by the Labor Department Traverse, Paragraphs Sixth and Seventh (R., 8).

various utterances and publications attributed to him and some basis for the other findings (*Bilokumsky* vs. *Tod*, 263 U. S., 140), and the court would be without jurisdiction to disturb them because based not only on a failure of the relator to go forward with proof but on affirmative evidence against him" (R., 30).

The Board of Review plainly and the District Judge apparently misconceived *Bilokumsky* vs. *Tod*. The opinion of this court in the *Bilokumsky* case concerns silence as to the *non-incriminating* fact of alienage and that fact alone. It was of that fact that the Court said:

> "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character [citing authorities]. Bilokumsky was present at the hearing, personally and by counsel. The ground for deportation involved a charge of acts which might have been made the basis of a serious criminal prosecution. Criminal Code, §6. If Bilokumsky was a citizen, inquiry into the facts was immaterial; and the whole proceeding must have fallen. He, presumably, knew whether or not he was a citizen. *Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him.* There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien" (263 U. S., at 153-4, our italics).

This Court laid down no new rule in the *Bilokumsky* case. "The general principles of relevancy," in Mr.

Wigmore's words, "tell us that the inference of assent may safely be made only when no other explanation is equally consistent with silence" (2 Evidence, 2nd ed., page 553). In the *Bilokumsky* case immediately after the extract we have quoted this Court noted that

> "Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it."

In the case at bar no adverse inference is proper from the relator's silence both (1) because his silence was as to incriminating and, therefore, privileged matter, and (2) because his refusal to answer was specifically based upon the refusal of the Department to permit him to inspect the evidence upon which the warrant of arrest issued (R., 15).

(1) The rule of the *Bilokumsky* case—to repeat the critically important sentence of the extract—was expressly limited to matters which "*could not* have a tendency to incriminate him." In the instant case Vajtauer's examination was held at Chicago, Illinois. Besides the danger of deportation he was confronted with the possibility of a prosecution under the Illinois Criminal Syndicalism Law (Ill. Rev. Stat., 1925, Chap. 38, Secs. 587-93, quoted in the Appendix, pages 42-3). That statute condemns as a felony all of the following: openly advocating "the reformation or overthrow, by violence or any other unlawful means" of our "representative form of government"; publishing or distributing any printed matter advocating "crime and violence, as a means of accomplishing" change; organizing or being a member of any association advocating change by any "unlawful means"; knowingly attending a meeting at which change by violence is advocated.

The questions which Vajtauer refused to answer were the following:

"Why did you come to the United States?" (R., 5).

"Is that your name on the h(e)ad of the pamphlet?" (R., 15).

After a reading (R., 16) by the inspector of two translated extracts from Exhibit "A":

"Are you the author of that passage?" (R., 16).

"Did you deliver a speech at the 'Spravedlvost' Hall at a meeting held on March 21, 1924, in Chicago?" (R., 17).

"Are you the author of these remarks at the Convention held at Moscow?" (R., 18).

"Do you belong to the Communist Party?" (R., 18).

Could or "could not" the answer to any one or to all of the questions "have had a tendency to incriminate"? Upon this consideration depends whether the case falls within the rule that "silence is evidence" or within that exception which, at the moment of stating the rule, this Court recognized.

It was in Chicago that both hearings were held (R., 12, 21), and "in Chicago" (R., 17) that the meeting in Spravedlvost Hall was supposed to have occurred. The State statute operated in the same jurisdiction where the Federal proceeding was conducted, and Vajtauer was "exonerated from disclosures which would have exposed him to the penalties of the State law" (*Ballman* vs. *Fagin*, 200 U. S., 186, 195).

U. S. vs. *Saline Bank*, 1 Peters, 100;

In re Hooks Smelting Co., 138 Fed., 954 (Dist. Ct., Eastern Dist. of Pa., 1905, cited with approval in *McCarthy* vs. *Arndstein*, 266 U. S., 34, 39, footnote).

Nor was it material that the alien did not in terms assert his privilege. "A witness need not state the reason for his refusal to answer if it is not asked for" (30 Am. & Eng. Encyc. of Law, 2nd ed., Title: Witnesses, 1166-7). One "could not be criticized very severely for avoiding, if possible, the discrediting claim of privilege by an answer literally exact," as Mr. Justice Holmes remarked in *Ballman* vs. *Fagin*, supra (200 U. S., at page 195). Even less could one be criticized for avoiding such a claim where the refusal to answer is put upon a reasonable ground (see [2] infra) and where the reason for refusal was not asked. The foregoing considerations apply under the authorities we have cited even in the familiar case where by contempt proceeding or otherwise an issue is raised of the propriety of the witness's refusal to answer. They apply a fortiori where as here the issue is solely as to the inference to be drawn from silence maintained upon advice of counsel.

(2) Vajtauer's refusal to answer was specifically based upon the refusal of the Department to permit him to inspect the evidence upon which the warrant of arrest issued (R., 15). Quite apart from the constitutional principle it is true that if silence is induced by a person's "doubts of his rights, or a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from that silence" (*Shaw, C. J., in Commonwealth* vs. *Kenney*, 12 Mete., 235, 237, quoted and approved in 2 Wigmore on Evidence, 2nd ed., page 555, and in the late and important case of *People* vs. *Pfahnschmidt*, 262 Ill., 411, 449).*

*Until February, 1924, the long established rules of the Labor Department (Rules of 1917, Rule 22, subd. 5 [b], Appendix, page 36) had provided that "at the beginning of the hearings under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be repre-

(*Footnote Continued on Next Page.*)

POINT VI.

There was no evidence to sustain the findings in the warrant of deportation.*

We have thus far seen that neither Section 23 nor any inference from silence aids the Government's case. The question is with respect to the affirmative proof actually introduced.

Judge Hand clearly agreed that there was no actual evidence to sustain the findings of the Labor Department. Of the attempts to sustain the warrant by reference to the evidence in the Record, Judge Hand said:

> "I am also in that event [assuming that the privilege against self incrimination applies] ready to go to the length of saying that the remarks, if made,

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sented by counsel." The new rules of 1924 did not become generally available until long after the hearings before the Board of Review and in the District Court. In fact as far as we have been able to discover they never became generally available, being superseded in 1925 by the rules of that year adopted pursuant to the changes in the Immigration Law which the statute of 1924 had made. There is no question that the whole body of proceedings both before the Inspector of Immigration and before the District Court were conducted by relator's counsel and by the Department upon the assumption that the rules of 1917 were applicable. Thus the 1917 rules provide that "objections and exceptions of counsel shall not be entered on the record, but may be presented by him in accompanying brief" (Rule 22, subd. 5 [b], see Appendix, page 37). The 1924 rules provide on the contrary that "objections of counsel shall be entered on the record" (Rule 18, subd. D, Par. 2, see Appendix, page 40). And we find Inspector Paul telling relator's counsel—in conformity with the 1917 but not with the 1924 rules: "Make your objections in your brief" (R., 17). Again, the 1924 rules call upon the inspector to give his "findings and conclusions" as well as a "recommendation" (Rule 18, subd. D, Par. 3, see Appendix, page 41). The 1917 rules call for a recommendation only without findings or conclusions (Rule 22, subd. 5 [c], Appendix, page 37). Mr. Paul made a recommendation without findings or conclusions (R., 23).

Upon the assumption thus unmistakably made that the 1917 rules were applicable and that the relator was entitled to the presentation of the evidence against him before he gave testimony he would have run a genuine danger of being held to have waived his objection based upon the rules, had he answered (*MacKusick ex rel. Pattavina* vs. *Johnson*, 3 Fed. [2nd], 398, 402, C. C. A., 1).

*See eighth Assignment of Error (R., 33).

by the relator at the Moscow Congress were not evidential of much of anything, and that the Chicago speech was not properly proved, and that he was not identified as the author of the pamphlet, Exhibit A" (R., 30).

There is no evidence that the relator is the Vajtauer *whose name is attached to any of the exhibits or appears in the Report of the Fourth Congress of the Communist International.*

"Identity of family names and of initials of the other names will not support an inference of identity of persons" (22 C. J., 93, note, citing authorities). In deportation cases there have been three attempts to predicate identity of person upon identity of name. In all three cases the attempt failed—in two instances when made by the petitioner, in one where the govrnment made it.

Ex parte Bun Chew, 220 Fed., 387;
Lum Bing Wey vs. *U. S.,* 201 Fed., 379;
Ex parte Long Lock, 173 Fed., 208.

To which we may add that in the case at bar there is no "identity" of initials. The relator's "full, true and correct name," as appears from the testimony (R., 13) and from the Labor Department's record of entry (R., 10) is "Emanuel Vajtauer." He was not known by any "other" (R., 13). Exhibit "A," as Inspector Paul remarks, bears the name of "Dr. E. *M.* Vajtauer" (R., 15). Exhibit "B" is simply a "report of a speech held by Dr.

*In the record at page 18, the exhibit there referred to is printed as bearing the name "Dajtauer." This was an inadvertent error of the printer in preparing the record for this Court. We, of course, make no point of the divergence between the name as thus mispelled in the record and the name of the relator.

Vajtauer" (R., 20). The former exhibit bears a middle initial although the relator had no such initial; the latter contains no initial. Neither of them contains the name "Emanuel."

As the only affirmative case that the Government even professed to establish was a case resting upon these exhibits, the failure of proof upon this point should alone dispose of the case. In fact as we shall see, even if the authorship of the documents could for the purposes of the appeal be admitted, the documents as they appear on the record show absolutely nothing.

There is no evidence that Exhibit "A" or what purport to be extracts from it express belief in or advocacy of the overthrow of all governments or of the government of the United States.

The interpreter, as we have seen, characterized the pamphlet as a whole as "merely a study of the Russian Revolution," which "deals with the problem of the Russian people who overthrew the Government of the Romanoffs and established the Communist government over there" (R., 15). Thus the only person who read Exhibit "A" as a whole or who could read any of it in the original described it in words which could with equal appropriateness be used of any of a dozen histories of the Russian Revolution.

In the face of this characterization of the whole pamphlet the scattered extracts appearing in translation are quite without significance. They may or may not express the author's own opinion. Text without context is meaningless.

> "No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar section from Aristophanes or Chaucer or Boccaccio or even from the Bible. The book, however, must be considered

broadly as a whole'' (*Halsey* vs. *N. Y. Society*, 234 N. Y., 1, 4).

The Chicago speech was not ''properly proved'' and could in any event have no bearing upon a charge of holding forbidden beliefs at or prior to the time of entry.

Judge Hand summarily disposed of the Chicago speech by saying it was not ''properly proved'' (R., 30). The only reference thereto is what purports to be a ''report'' (R., 20-1). It is obviously a mere summary by some unknown reporter in his own language. No extract even purports to be translated, much less the whole.*

Again, there was no charge of misbehavior after arriving in this country contained in the warrant of arrest (R., 11-12) and no finding of any such misbehavior in the warrant of deportation (R., 27).

There is no evidence that the abridged report of the Fourth Congress of the Communist International expresses belief in or advocacy of overthrow of all governments or of the Government of the United States.

The ''abridged report'' of the Fourth Congress of the Communist International was not introduced in evidence against the relator in the Department (Compare R., 35).** Certain excerpts, however, were read into the hearing by Inspector Paul as ''a statement purporting to have been made by the respondent Dr. Vajtauer'' (R., 17). The merest glance will show that these remarks too, ''if made by the relator at the Moscow Congress,'' to quote Judge Hand once more ''were not evidential of much of anything'' (R., 30).

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*See for the Board of Review's recognition that this is "a summary merely," Record, page 26.

**The report became a part of the record by stipulation (R., 35) when forwarded from Washington with the pamphlet in the foreign language.

That a deportation warrant with no evidence to support it cannot be upheld stands to reason (*Zakonaite*, vs. *Wolf*, 226 U. S., 272, 274-5; *Bilokumsky* vs. *Tod.*, 263 U. S., 149, 153). In the case at bar Judge Hand found no such evidence. The view he took of the record is a view whose correctness the United States Attorney came very close to conceding. To his mind "the record is very weak" (R., 28).

POINT VII.

The proceedings were unfair in all the following respects: the rules of the Labor Department were violated; documents were received in a foreign language and in the form of scattered excerpts; the record is incomplete.*

Deportation proceedings are administrative and informal. The requirement that the alien be given a "fair though summary hearing" (*Zakonaite* vs. *Wolf*, 226 U. S., 272, 275; *Low Wah Suey* vs. *Backus*, 225 U. S., 460, 472) is not for that reason any the less imperative. Otherwise the result is a denial of due process (*Bilokumsky* vs. *Tod*, 263 U. S., 149, 157, citing authorities). The unfairness of the proceedings here under review was manifested in all of the following ways:

(1) *Violation of the Labor Department rules.*

The warrant of arrest issued without regard to the limitations laid down by the rules of the Department.

> "*Application for Warrant of Arrest.* The application must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, *should be accompanied by some substantial supporting evidence.* If the facts stated are within the personal knowledge of the inspector reporting the case * * * they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government * * * the application should be accompanied by the affidavit of the person giving the information or by a trans-

*See fifteenth, sixteenth and seventeenth Assignments of Error (R., 34).

cript of a sworn statement taken from that person by an inspector." (Our italics. Rules of 1924, Rule 18, Subd. B, Par. 1, Appendix, page 39. For the same regulation in Rule 22 of 1917, Subd. 3, see Appendix, page 36.)

The sole evidence upon which the warrant issued was the letter signed "A Union Man," and transcribed by his daughter (R., 9).

"The fact that the immigration authorities received a confidential communication concerning the applicant's right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was sufficient to constitute the hearing unfair," as the Circuit Court of Appeals for the Ninth Circuit flatly decided in *Chew Hoy Quong* vs. *White* (249 Fed., 869, 870).

A violation of the rules protecting the alien against an arrest upon insufficient evidence may indeed be cured if the subsequent proceedings are fair (*Nishimura Ekiu* vs. *U. S.*, 142 U. S., 651, 652; *Bilokumsky* vs. *Tod.*, 263 U. S., 149, 158). The unfairness which characterized the inception of these proceedings, we shall see, persisted throughout their whole course.*

(2) *Improper Admission of Evidence.*

(a) Vajtauer was asked whether he had delivered a speech at Spravedlvost Hall at a meeting held on March

*In two other respects, both separately treated below, the Labor Department departed from its practice or violated its rules. An interpreter never properly qualified was permitted to testify (2, infra) and the record was incomplete (3, infra). We have elsewhere remarked (pages 31-32, footnote) that both the relator's attorney and the Government proceeded upon the assumption that the 1917 rules were applicable. Upon that assumption there was another violation of rules in that the alien was not given an opportunity to examine the evidence upon which the warrant issued (see Appendix, page 37, and compare especially as to this *Tisi* vs. *Tod*, 264 U. S., 131, 134).

21, 1924 (R., 17). He did not answer. Inspector Paul then introduced in evidence as Exhibit "B" a "translation made by a competent interpreter of said speech made by Dr. Vajtauer on March 21, 1924," but in fact no translation was offered: In the Board of Review's own language Exhibit "B" is "a *summary* merely." The speech, again in the Board of Review's own language, "was not reported in its entirety" (R., 26). The District Court, as we know, held that the speech "was not properly proved" (R., 30).

(b) So with respect to the "pamphlet in a foreign language consisting of 46 pages" referred to as Exhibit "A" (R., 18). Extracts only were offered in evidence (R., 15). A translation and a translation of the whole was needed in order to make the document intelligible or the proceedings fair. The N. Y. Court of Appeals in a late case involving the propriety of a play remarked (*People* vs. *Weinberger*, 239 N. Y., 307, 311-12): "A change of a word here or there may change the meaning of a scene."

The case at bar perfectly illustrates the impossibility of predicating any judgment upon scattered excerpts. The Board of Review, of course, read the excerpts alone. Speaking with direct reference to them the Board came to the conclusion "that the author believes in the overthrow of government and all forms of law by force or violence" (R., 25). On the other hand the interpreter, the only person who read the entire pamphlet, thus described it:

> "It is Dr. Vajtauer's pamphlet from the Revolution and the Dictatorship of the proletariat. This pamphlet is merely a study of the Russian revolution. It was writen in 1920 and deals with the problem of the Russian people who overthrew the Government of the Romanoffs and estabioshed the Communist government over there" (R., 15).

The objections to the documents are intensified by a consideration of the persons through whom these documents were made available. The Labor Department practice (formulated in the mimeographed sheet given to the inspector to enable him to report the proceedings) requires that an interpreter be either "first duly sworn" or "an official interpreter of the U. S. immigration service" (R., 12). Dianish who purported (R., 15) to translate the excerpts from Exhibit "A" was not shown to have been either.

There is absolutely no showing who made the "report" of the Chicago speech (or even in what foreign language it was delivered—R., 17) or the "abridged report" of the Moscow Congress.

* * * * * *

It is true indeed that in deportation proceedings technical rules for the exclusion of evidence will be disregarded. "But the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended" (Sanborn, C. J., in *Whitfield* vs. *Hanges*, 222 Fed., 745, 754, C. C. A., VIII). In *Backes* vs. *Owe Sam Goon* (235 Fed., 847), the Circuit Court of Appeals in the Ninth Circuit, citing authorities, declared, "*In the absence of the best evidence* attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial review" (page 854, our italics).*

(3) *Incompleteness of the Record.*

In the District Court when what purported to be the record was attached to the return on the writ of habeas

*For the objections to the exhibits see R., 15, 17. These objections were amplified in the brief in accordance with the Department's practice (Appendix, pages 37, 40).

corpus, relator at once made the point that the record was incomplete (Traverse, Par. 3, R., 7). In part, but in part only, this defect was subsequently made good.

Exhibit "A," the pamphlet in the foreign language, was subsequently forwarded from Washington with a letter by Secretary Henning saying that it was "inadvertently overlooked when the file was certified for use in habeas corpus proceedings" (R., 28).

But the record nevertheless remained incomplete. Vajtauer's passport, the evidence upon which he largely relied to establish that he entered the United States "lawfully" is still missing and so is the original of the anonymous letter signed "A Union Man," on which the warrant of arrest issued.

"At the close of the hearing," the rules provide, "the full record shall be forwarded to the Bureau" (1924, Rule 18, Subd. D, Par. 3, Appendix, page 40; for the identical provision in the 1917 Rules, see Rule 22, Subd. 5 [c], Appendix, page 37). In *Kwock Jan Fat* vs. *White* (253 U. S., 454) there was presented to this Court in its simplest form—by demurrer to a petition for a writ of habeas corpus—the effect of a violation of the rule, or rather of the requirements of simple fairness and orderly procedure which the rule embodies. The Court overruled the demurrer on the ground, among others, that a "full record" was not "preserved of the essentials on which the executive officers proceed to judgment."

> "For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed" (page 464).

To the same effect:

> *In re Can Pon*, 168 Fed., 479, 484, affirming 161 Fed., 618, 623.

* * * * * * *

The attitude of mind that characterized the proceedings as a whole well appears from the simple statement of Mr. Paul, the inspector who conducted the hearings, when he submitted the record thereof to the Labor Department in Washington (R., 23). It was not because of any testimony that had been given but because of the relator's refusal to answer—a refusal in accordance with his constitutional right—that Mr. Paul recommended that the warrant of deportation issue. It was not because of any proved fact that he came to a conclusion in favor of deportation but because "in my judgment, this man is a radical of the radicals, and I therefore recommend he be returned to the country whence he came" (R., 23).

The record which the United States attorney found "very weak" (R., 28) is a record, we submit, upon which this Court cannot uphold the deportation warrant. The proceedings of the administrative tribunal are charged with unfairness and error; error permeated, again, the decision of the District Court. It was because of a combination of errors—the institution of proceedings upon an unsworn and anonymous communication; the reception of scattered excerpts from long documents in foreign languages; the omission of documents from the record—an omission none the less serious because of course "inadvertent" (R., 28); the misconception by the Board of Review of the effect of this Court's decision in *Bilokumsky* vs. *Tod;* the erroneous construction by the District Judge of Section 23 of the Act of 1924—that the deportation warrant was issued and has thus far been sus-

tained. With these errors, as we believe, made plain, the ruling here, we submit, should be the opposite.

The judgment of the Court below should be reversed and the relator discharged.

Dated, November 5, 1926, and respectfully submitted,

WALTER H. POLLAK,
ISAAC SHORR,
CAROL WEISS KING,
All of New York City,
Counsel for Relator-Appellant.

NOV 8 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 111

THE UNITED STATES OF AMERICA, ex rel. EMANUEL VAJTAUER,

Appellant,

against

COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK,

Respondent.

APPENDIX

(Applicable Statutes, Proceedings and Rules.)

WALTER H. POLLAK,
ISAAC SHORR,
CAROL WEISS KING,
Counsel for Appellant.

Gallo & Ackerman, Inc., 6 Church St. & 107 Liberty St., 'Phones Rector 7257-8.

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Congressional Debate Relating to the Passage of Section 23 of the Immigration Act of 1924.

HOUSE OF REPRESENTATIVES.

(Cong. Rec., 68th Cong., 1st Sess., 6252-6.)

The Clerk read as follows:

> Sec. 23. In any proceeding under the Immigration laws the burden of proving the right of any individual to enter or remain in the United States shall, as between him and the United States, be upon such individual.

With the following committee amendment:

> Page 30, line 11, strike out the word "individual" and insert in lieu thereof the word "alien"; and on page 30, line 13, strike out the word "individual" and insert in lieu thereof the word "alien."

The Chairman: The question is on the committee amendment.

The question was taken, and the committee amendment was agreed to.

Mr. Begg and Mr. Nelson of Wisconsin rose.

The Chairman: For what purpose does the gentlemen from Ohio rise?

Mr. Begg: To offer an amendment.

The Chairman: Is it a perfecting amendment?

Mr. Begg: It is to strike out the paragraph and to substitute another one for it.

The Chairman: The gentlemen is recognized for that purpose, and the Clerk will report the amendment.

The Clerk read as follows:

Amendment offered by Mr. Begg: Page 30, lines 10 to 13, inclusive, strike out section 23, and in lieu thereof insert the following:

"Sec. 23. Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration certificate, if any, or other documents concerning such entry in the custody of the Department of Labor."

Mr. Begg: Mr. Chairman and gentlemen of the committee, I believe this amendment will meet the approval of both the proponents and the opponents of this bill. I want to call attention to Section 23 and the way it is drawn. It can cause trouble for every alien in the United States. The intent of the bill and the intent of this legislation is not to deal with the men and women who are already within the country, but is to regulate the flow of the new immigrants. My amendment, if adopted, puts the burden of proof of their desirability and their qualification for entrance into the country on the immigrant squarely, and that is where it belongs; but this particular paragraph as drawn places that burden upon any man or woman that has already been admitted, even for four and a half years. If any official or other person for any reason wants to summon them before any immigration official, they can put the burden of proof on that man or woman who has already resided here for four or five years, maybe, within 30 days of the time of getting their final papers. They would have the burden of proof upon them to prove their desirability to remain and qualify.

Mr. LaGuardia: Will the gentleman yield?

Mr. Begg: In just one moment. Such a procedure, I will submit to all, is contrary to the practice and the basic principles of the United States in guaranteeing everybody, when accused of any crime, the right of a supposition of innocence until they are proven guilty.

If my amendment is adopted, the provision does not apply to residents here but applies to men outside the gates. When they want to get in then it is up to them to prove that they are fit to be admitted.

Mr. LaGuardia: The gentleman's amendment puts the burden on the immigrant when he wants to come in, whereas now it is on the Government.

Mr. Miller of Washington: Is it not a fact that a citizen of the United States in order to exercise his right to vote takes the burden on himself to prove that he has that right.

Mr. Begg: Certainly.

Mr. Miller of Washington: Then why do you except aliens now residing here?

Mr. Begg: There is no burden on the citizen except to show his age.

Mr. Miller of Washington: He must show his birthplace and the date of his birth—

Mr. Begg: Let me ask the gentleman if it is not contrary to the American idea of justice to hale a man up before the bar of justice and make him prove that he is innocent of the charge against him?

Mr. Miller of Washington: It is not the guilt or innocence, it is the right of a man to remain in this country. To your question I will say yes; it is right.

The Chairman: The time of the gentleman from Ohio has expired.

Mr. Begg: I ask for two minutes more.

The Chairman: Is there objection?

There was no objection.

Mr. Begg: The man's presence in the United States is all the evidence that is required today to be conclusive proof that he is entitled to be here unless the Government of the United States can show that he is an alien smuggled into this country. I do not believe the American people want to adopt that idea.

Mr. Miller of Washington: That is not all of it.

Mr. Begg: That is all that enters into this amendment.

Mr. Miller of Washington: I assert that I am a certain number of years of age, and the burden is on me to show that I am eligible to a seat in the House of Representatives.

Mr. Begg: Were you called upon to furnish documentary evidence to your Governor of that fact?

Mr. Miller of Washington: No, sir.

Mr. Begg: Certainly not. It is contrary to the idea of every American citizen to challenge every statement that the citizen makes and say you are guilty until you are proved innocent.

Mr. Vaile: When you vote do you have to prove that you have not stolen any money or you have not committed murder?

Mr. Begg: Oh, no.

Mr. Vaile: But he does have to prove that he is 21 years of age.

Mr. Nelson of Wisconsin: Mr. Chairman, I have prepared two amendments, one to strike out the section and the other, if that fails, to strike out the words "or remain." I appeal to the House. I am for this bill. I have uniformly been for immigration bills, but let us not do an injustice.

Mr. Johnson of Washington: If the gentleman will yield, I would like to say, in order to save time in debate, that as far as I am personally concerned, and I think some other members of the Immigration Committee are also quite willing, I will agree to the substitute that has been offered. I will take the opportunity to say in the

gentleman's time that inasmuch as a great majority of the Members of the House have so firmly stood by the committee and all the provisions of the bill that when I find a provision being challenged from a constitutional standpoint, and from the viewpoint that as written it may be dangerous, I am willing to take a more modified provision in the hope that we are playing fair with all hands. We have no animosities. This House, I know, does not want to press down too hard.

Mr. Raker: I want to say that I do not accept it. This provision has been agreed to by the committee.

Mr. Nelson of Wisconsin: Men who are in favor of restricted immigration, men who love their country, fail to see any justice in this provision subjecting five or six million aliens who have come here with the assurance that they would be held innocent until proved guilty. Under this provision in the bill they can be accused and be subjected to all sorts of dangers and embarrassments. I would like to have the letter read which I send to the Clerk's desk.

The Chairman: The gentleman from Wisconsin asks unanimous consent that the letter be read. Is there objection?

There was no objection.

The Clerk read as follows:

The University of Wisconsin,
Department of Economics,
Madison, March 18, 1924.

Hon. John M. Nelson,
House of Representatives,
Washington, D. C.

Dear Sir:

I wish to express my amazement at Section 23 of H. R. 6540, introduced by Congressman Albert Johnson of Washington. In it it appears that the burden

danger to life; (2) whether he will require special care and attention on the ocean voyage.

of proving one's right to remain in the United States is upon the individual himself. I cannot see but that this would place every individual of our 14,000,000 foreign born under the necessity of proving his right to remain if any charge against him justifying deportation were made by any native. In its possibilities this appears to be one of the most monstrous clauses that I have ever perceived in any bill. I presume that it is an oversight, but certainly one that needs to be corrected.

Very sincerely yours,

E. A. ROSS.

Mr. Nelson of Wisconsin: He is one of the most noted men in sociology in the United States, was president of the National Economic Association, and a man of such prominence in his field that former President Roosevelt wrote the preface or introduction to one of his books. The following is taken from Who is Who in America:

Library of Congress,
Representatives' Reading Room,
Washington, D. C.

Edward Alsworth Ross, sociologist; b. St. Virgen, Ill., Dec. 12, 1866; s. William Carpenter and Rachel (Alsworth) R.; A.B., Coe Coll., Ia., 1886; U. of Berlin, 1888-9; Ph.D., Johns-Hopkins, 1891; (LL.D., Coe, 1911); m. Rosamond C. Simons, of Washington, June 16, 1891. Prof. economics, Ind. U., 1891-2; asso. prof. polit. economy and finance, Cornell, 1892-3; prof. sociology, Leland Stanford, Jr. U., 1893-1900; U. of Neb., 1901-6; U. of W., since 1906. Lecturer on sociology, Harvard, 1902; U. of Chicago, 1896, 1905. Pres. Am. Econ. Assn., 1892-3; advisory editor, Am. Journal of Sociology since 1895; Sin and Society,

1907; Social Psychology, 1908; Latter Day Sinners and Saints, 1910; The Changing Chinese, 1911; Changing America, 1912; The Old World in the New, 1914; South of Panama, 1915; Russia in Upheaval, 1918; What Is America? 1919; The Principles of Sociology, 1920; The Russian Bolshevik Revolution, 1921. Contributor of numerous articles to econ. and social. journals and lit. periodicals. Home: Madison, Wis.

The Chairman: The time of the gentleman from Wisconsin has expired.

Mr. Robsion of Kentucky: Mr. Chairman, I have not taken any time under the reading of this bill, and I ask unanimous consent to proceed for six minutes out of order.

[Mr. Robsion's remarks, together with the short discussion permitting them to be made without objection, are omitted. See pages 6252-3.]

Mr. Temple rose.

The Chairman: The gentleman from Pennsylvania is recognized.

Mr. LaGuardia: Mr. Chairman, I rise to a question of personal privilege.

The Chairman: The gentleman cannot rise to a question of personal privilege when some other gentleman has the floor.

Mr. LaGuardia: Mr. Chairman, I ask unanimous consent to proceed for three minutes.

The Chairman: The gentleman from Pennsylvania has the floor.

Mr. Temple: Mr. Chairman, I ask the attention of the chairman of the committee. There is a provision in one of the sections which has already been passed that any individual who, when applying for an immgration certificate or permit, or for admission to the United States, personates another, or falsely appears in the name of a

deceased individual or any individual who sells or otherwise disposes of, or offers to sell or otherwise dispose of, an immigration certificate, or commits various other offenses, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. The point I have in mind is this: That offense will be committed in a foreign country, outside the jurisdiction of the United States; for instance, by a man who attempts to sell a permit which he has received at an American consulate in a foreign country.

Mr. Johnson of Washington: Not as to the permit. The permit is a document that is issued here in the United States.

Mr. Temple: An immigration certificate?

Mr. Johnson of Washington: That is different.

Mr. Temple: An immigration certificate is received on application from the consul?

Mr. Johnson of Washington: Yes.

Mr. Temple: Who is doing business in a foreign country?

Mr. Johnson of Washington: Yes.

Mr. Temple: If a foreigner in a foreign country commits an offense defined in this paragraph, how can we get him?

Mr. Johnson of Washington: We cannot get him there.

Mr. Temple: And if he comes to this country, can he then be punished for an offense committed while on foreign soil?

Mr. Johnson of Washington: I am not an international lawyer, but I would be inclined to doubt that he could be.

Mr. Temple: Is it the intention that he shall be?

Mr. Johnson of Washington: It is the intention to go just as far as we can to prevent barter and sale in passports or any other documents of the United States anywhere in the world.

Mr. Temple: With that I am in entire harmony; but I am calling attention to this so that it may be corrected,

if it needs correction, and I am inclined to think that it does.

The Chairman: The time of the gentleman from Pennsylvania has expired.

Mr. LaGuardia: Mr. Chairman, I ask unanimous consent to proceed for three minutes.

The Chairman: The gentleman from New York asks unanimous consent to proceed for three minutes. Is there objection?

Mr. Connally of Texas: In order or out of order?

Mr. LaGuardia: Out of order.

The Chairman: No consent has been given to proceed out of order.

Mr. LaGuardia: Mr. Chairman, I ask unanimous consent to proceed out of order for three minutes.

The Chairman: The gentleman from New York asks unanimous consent to proceed out of order for three minutes. Is there objection?

Mr. Free: I object.

The Chairman: Objection is made to the gentleman proceeding out of order. The gentleman is recognized for three minutes.

Mr. LaGuardia: The gentleman does not mean to object? I ask unanimous consent to proceed out of order for three minutes.

Mr. Free: I object.

Mr. LaGuardia: I thank the gentleman.

Mr. Newton of Minnesota: Mr. Chairman, I rise in opposition to the amendment. Section 23 puts the burden of proof upon the alien "in any proceeding under the immigration laws" as to both his entry and remaining in the United States. The gentleman from Ohio (Mr. Begg) moves to amend by striking out Section 23 and inserting in lieu a provision which retains only the provision as applied to the right to enter. His reasons are that the provision as drawn is repugnant to all prin-

ciples of American jurisprudence. It must be borne in mind that this pertains to entry or deportation only. There is no question of criminal guilt to be determined. It is only the right first to enter and then to remain.

Mr. Begg: Will the gentleman yield? I think the gentleman misunderstands the amendment.

Mr. Newton of Minnesota: No; I have read the amendment.

Mr. Begg: This has nothing to do with the right of entry. It is only after they have entered.

Mr. Newton of Minnesota: The gentleman's amendment compels the alien to prove that he had a right under the law to enter. It does away with the provision which compels him to prove his right to remain, if he was lawfully entitled to enter. An alien following his arrival can be deported for certain conduct here in America. Under the provisions of the section as drawn, the burden of proof in any such proceeding of deportation would be upon the alien to establish his right to remain. This is a legal provision. My purpose is largely to call the attention of the House to the fact that there is now a provision in the Chinese exclusion act making it incumbent upon the Chinaman in any proceedings under the act to establish his right to remain here. The United States courts have held that provision to be valid. Now I, for one, do not feel that we ought to amend this provision at the present time simply upon a hurried consideration of the question.

Mr. Moore of Virginia. If the gentleman will yield.

Mr. Newton of Minnesota: I will.

Mr. Moore of Virginia: I was about to say with reference to what the gentleman stated that the Supreme Court has upheld a provision equivalent to this with reference to the exclusion of the Chinese.

Mr. Newton of Minnesota: It will be found in Volume 259 of the United States Reports.

Mr. Chairman: The time of the gentleman has expired.

Mr. Mills: Mr. Chairman and gentlemen of the committee, I dislike to take up the time of the committee in view of your apparent desire to dispose of the matter, but this particular amendment may mean in the future the saving of a great hardship to thousands and thousands of individuals. It is not just a question of legal technicality, it is a very practical question. A man comes here lawfully under this law, complies with every provision of this law, is lawfully admitted, and four years later or four and a half years later, just before he is prepared to become a citizen, some personal enemy makes specific charges against him that he has committed, let us say, a felony 10 years before in the country of his origin. Now as a practical matter how is that unfortunate individual going to submit affirmative proof that he was not guilty of such a crime as would exclude him?

Mr. Begg: The amendment of the gentleman from Ohio does not require him to submit.

Mr. Mills: I am speaking in support of the amendment in answer to my friend from Minnesota.

Mr. Begg: I misunderstood the gentleman.

Mr. Mills: What is the need of the passage of the amendment? What is the situation today? Why, if on examination before a commissioner if even a prima facie case is made out for deportation and the commissioner decides in favor of deportation, all that the courts will do is to review the case to see whether the man has had a fair hearing, and will not go into the question of the guilt or innocence; in other words, the courts leave much to the discretion of the commissioner, and as far as I know the situation today as it exists has given no cause for complaint, has disclosed no weakness in so far—

Mr. Newton of Minnesota: Will the gentleman yield:

Mr. Mills: I cannot yield further. In so far as the Government is concerned when it comes to its ability to deal with the cases of aliens who should be deported.

Now before you commit a grave injustice, before you open wide the door of opportunity for possible injustice to thousands of individuals who may be subject to deportation owing to personal enmity or personal suspicion or unjust charges, I submit that at least a conclusive case should be presented to this House showing the need of a reversal of what we have always considered the basic principle of justice in this country, that each man is presumed to be not guilty but innocent until it is shown to the contrary. (Applause.)

Mr. Raker: Mr. Chairman—

The Chairman: For what purpose does the gentleman from California rise?

Mr. Raker: To move to strike out the last three words. Mr. Chairman and gentlemen of the committee, in fairness to the committee and myself I feel as though I ought to say a few words of the amendment. The committee, after much consideration, adopted this Section 23—

Mr. Sabath: The gentleman is in error, because I—

Mr. Raker: Maybe the gentleman did not vote against everything.

Mr. Johnson of Washington: Mr. Chairman, I make the point of order that matters in the committee are being discussed.

Mr. Raker: I did not say unanimously.

Mr. Sabath: You are just as wrong in this as on other things.

Mr. Raker: I said unanimously considered—that is what I am intending to convey.

Mr. Johnson of Washington: Mr. Chairman, a point of order. I make the point of order.

The Chairman: The gentleman from Washington makes the point of order that matters in the committee are being discussed. The Chair sustains the point of order, and gentlemen will confine their remarks to something else.

Mr. Raker: This matter was undoubtedly considered by the committee or it could not be here. That is certainly proper to state. Now, I have not said anything about how the committee voted, and I do not intend to.

Mr. Watkins: Mr. Chairman, will the gentleman yield?

Mr. Raker: Yes.

Mr. Watkins: It is true that 17 men signed this, approving this?

Mr. Raker: Please do not interrupt me. Fifteen men have signed this majority report.

I find in a public document—which I can read—that the great lawyers of another body have adopted the same amendment; lawyers with national and international reputations. There is not a man on the floor of the House today—and there are many brilliant lawyers here—who has raised his voice and said that this is unconstitutional, and I know they will, none of them, raise their voices and say that. The Supreme Court of the United States within the last month, affirming the Chinese act, has held that it is not unconstitutional. The great lawyers in the United States, in litigation respecting the Volstead Act, are trying to hold it unconstitutional—and there you charge a man with a crime under the Volstead Act, and the burden is upon him. There are a dozen statutes on the books that hold that the burden of proof is on the accused party.

I want to read a section of the Chinese Exclusion Law, on page 493, Volume 180. This is the Act providing that—

> any Chinese person or person of Chinese descent—arrested under the provision of this Act, or the Acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

Mr. Miller of Washington: Mr. Chairman, will the gentleman yield to me for just a short question?

Mr. Raker: In a moment. That declaration has been approved and affirmed as a proper legal declaration by the Supreme Court of the United States. I have before me one of the latest cases—and there are at least half a dozen others—showing that deportation is not a criminal proceeding; it is a civil proceeding, and therefore the law relative to charging one with crime never applies in a deportation proceeding. This is the last enunciation by the Supreme Court of the United States.

The Chairman: The time of the gentleman from California has expired.

Mr. Raker: May I speak five minutes longer?

The Chairman: Is there objection to the request of the gentleman from California?

There was no objection.

Mr. Miller of Washington: Mr. Chairman, will the gentleman yield?

Mr. Raker: Yes.

Mr. Miller of Washington: I wish to ask this question: A man smuggles himself across the frontier. He is accused of being unlawfully in the United States. He folds his arms and remains silent.

Mr. Raker: Yes; the gentleman from Washington is right. There are two provisions in Section 23 (1). There is no one who claims that the burden of proof is on the man who seeks the right to enter the United States. That is unquestioned. The second provision concerns those who are in the United States when proceedings are sought to deport them. The testimony before the committee shows, and the Secretary of Labor has said, that within the last year alone over 300,000 men had entered the United States unlawfully. You start a proceeding for deportation, and the United States must prove under this Act and under the law that he is an alien. Then

this Court says here, "The man shall not stand mute, but you can compel him to testify." Under this provision he would have to testify. And why? He was in the United States, and you can get the record of every port of entry in the United States, and then if he has overcome the burden of proof he is entitled to remain.

There is not a lawyer within the sound of my voice but realizes and knows that you cannot deport a man by charging that he has committed a crime. You have got to prove the crime and get an adjudication by the Court, and then the certified copy of the adjudication of the Court proves the allegation.

Mr. LaGuardia: Mr. Chairman, will the gentleman yield?

Mr. Raker: Yes; I yield to the gentleman from New York.

Mr. LaGuardia: It is not necessary to prove and convict him if it is alleged that he has committed a crime.

Mr. Raker: Yes. I say, without fear of contradiction, that a man cannot be deported from the United States without a judgment of conviction, and that judgment of conviction must be final; and in addition to that he must remain in jail until he has served his sentence, and after he has served his sentence he may be deported.

Mr. Wefald: Mr. Chairman, will the gentleman yield?

Mr. Raker: Yes; I yield to the gentleman.

Mr. Wefald: As the bill now stands, must not an immigrant coming into this country bring with him his prison record, if he has one?

Mr. Raker: Yes.

Mr. Wefald: What more do you want?

Mr. Raker: That he himself would do exactly what this bill requires. He has his record. Let him show it. He has no right to stand mute.

Mr. Chairman: I yield back the remainder of my time. (Applause and cries of "Vote!")

Mr. Johnson of Washington: Mr. Chairman, I move that all debate on the Section, all amendments thereto, and all amendments offered as a new Section or Sections do now close.

The motion was agreed to.

The Chairman: The debate is closed.

Mr. Begg rose.

The Chairman: For what purpose does the gentleman from Ohio rise?

Mr. Begg: I ask unanimous consent that the amendment that I offered be read again.

The Chairman: Without objection, the Clerk will again report the amendment offered by the gentleman from Ohio.

The Clerk read as follows:

> Amendment offered by Mr. Begg: Page 30, lines 10 to 13, inclusive, strike out Section 23, and in lieu thereof insert the following:
>
> "Sec. 23. Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration certificate, if any, or other documents concerning such entry in the custody of the Department of Labor."

The Chairman: The question is on agreeing to the amendment offered by the gentleman from Ohio [Mr. Begg].

The question was taken; and on a division (demanded by Mr. Begg) there were—ayes 121, noes 111.

Mr. Raker: Mr. Chairman, I ask for tellers.

Tellers were ordered; and the Chairman appointed as tellers Mr. Johnson of Washington and Mr. Raker.

The committee again divided; and the tellers reported —ayes 140, noes 131.

So the amendment was agreed to.

(Cong. Rec., 68th Cong., 1st Sess., page 6644.)

The amendment was agreed to.

Mr. Reed of Pennsylvania: The bill as reported from the committee provides that in any proceeding under the immigration laws the burden of proving the right of an alien to admission here shall be on the alien. That is a little bit too broad. It seems to me the provision in the bill as it passed the House is very much better, and therefore I propose the following amendment, to be inserted on page 25.

The Presiding Officer: The Secretary will state the amendment.

The Reading Clerk: On page 25 the Senator from Pennsylvania proposes to strike out lines 13 to 16, inclusive, and to insert:

> Sec. 18. Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration certificate, if any, or of other documents concerning such entry, in the custody of the Department of Labor."

Mr. Norris: Mr. President, I want to ask a question of the Senator from Pennsylvania about that amendment. If we are going to deport anybody, we must not put the burden of proof on him to show that he ought not to be deported. Does this amendment provide that in case

the Government of the United States desires to deport an alien who is a resident of the United States the burden of proof shall be on the alien?

Mr. Reed of Pennsylvania: The bill as reported from the committee does just that, and we thought it was unfair. So we propose to change it by this amendment so as to provide that in deportation proceedings the burden of proof shall be on the alien to show that he entered lawfully. Then the burden of proof would shift to the Government.

Mr. Norris: I did not understand it that way. If that is what the amendment provides, I am in favor of it.

Mr. Reed of Pennsylvania: That is the exact effect of it.

The amendment was agreed to.

Act of Feb. 5, 1917, C. 29, 39 Stat., 874, 889-90.

SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this act or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other im-

moral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: *Provided*, that the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this act: *Provided further*, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act; nor shall any

alien convicted as aforesaid be deported until after the termination of his imprisonment: *Provided further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: *Provided further*, That the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof; *Provided further*, That any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported in the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

Act of October 16, 1918, C. 186, 40 Stat. 1012, as Amended by the Act of June 5, 1920, C. 251, 41 Stat. 1008.

An Act to amend the Act entitled "An Act to exclude an expel from the United States aliens who are members of the anarchistic and similar classes," approved October 16, 1918 (41 Stat. 1008).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 1 of the Act entitled "An Act to exclude and expel from the United States aliens who are members of the anarchistic and similar classes," approved October 16, 1918, is amended to read as follows:

That the following aliens shall be excluded from admission into the United States:

(a) Aliens who are anarchists;

(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches opposition to all organized government;

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury, or destruction of property, or (4) sabotage;

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute,

print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching opposition to all organized government, or advising, advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury, or destruction of property, or (4) sabotage;

(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d).

For the purpose of this section: (1) the giving, loaning, or promising of money or anything of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning, or promising of money or anything of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation.

SEC. 2. That any alien who, at any time after entering the United States, is found to have been at the time of

entry or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this act irrespective of the time of their entry into the United States.

SEC. 3. That any alien who shall, after he has been excluded and deported or arrested and deported in pursuance of the provisions of this Act, thereafter return to or enter the United States or attempt to return to or to enter the United States shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a term of not more than five years; and shall, upon the termination of such imprisonment, be taken into custody, upon the warrant of the Secretary of Labor, and deported in the manner provided in the Immigration Act of February fifth, nineteen hundred and seventeen.

Act of May 26, 1924, C. 190, 43 Stat. 153.

An Act to limit the immigration of aliens into the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Immigration Act of 1924."

IMMIGRATION VISAS.

SEC. 2.* (a) A consular officer upon the application of any immigrant (as defined in Section 3) may (under the conditions hereinafter prescribed and subject to the limitations prescribed in this Act or regulations made thereunder as to the number of immigration visas which may be issued by such officer) issue to such immigrant an immigration visa which shall consist of one copy of the application provided for in Section 7, visaed by such consular officer. Such visa shall specify (1) the nationality of the immigrant; (2) whether he is a quota immigrant (as defined in Section 5), or a non-quota immigrant (as defined in Section 4); (3) the date on which the validity of the immigration visa shall expire; and (4) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws as may be by regulations prescribed.

(b) The immigrant shall furnish two copies of his photograph to the consular officer. One copy shall be permanently attached by the consular officer to the immigration visa and the other copy shall be disposed of as may be by regulations prescribed.

(c) The validity of an immigration visa shall expire at the end of such period, specified in the immigration

*There is no Section 1.

visa, not exceeding four months, as shall be by regulations prescribed. In the case of an immigrant arriving in the United States by water, or arriving by water in foreign contiguous territory on a continuous voyage to the United States, if the vessel, before the expiration of the validity of his immigration visa, departed from the last port outside the United States and outside foreign contiguous territory at which the immigrant embarked, and if the immigrant proceeds on a continuous voyage to the United States, then, regardless of the time of his arrival in the United States, the validity of his immigration visa shall not be considered to have expired.

(d) If an immigrant is required by any law, or regulations or orders made pursuant to law, to secure the visa of his passport by a consular officer before being permitted to enter the United States, such immigrant shall not be required to secure any other visa of his passport than the immigration visa issued under this Act, but a record of the number and date of his immigration visa shall be noted on his passport, without charge therefor. This subdivision shall not apply to an immigrant who is relieved, under subdivision (b) of Section 13, from obtaining an immigration visa.

(e) The manifest or list of passengers required by the immigration laws shall contain a place for entering thereon the date, place of issuance, and number of the immigration visa of each immigrant. The immigrant shall surrender his immigration visa to the immigration officer at the port of inspection, who shall at the time of inspection indorse on the immigration visa the date, the port of entry, and the name of the vessel, if any, on which the immigrant arrived. The immigration visa shall be transmitted forthwith by the immigration officer in charge at the port of inspection to the Department of Labor under regulations prescribed by the Secretary of Labor.

(f) No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this Act, nor shall such immigration visa be issued if the consular officers knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.

(g) Nothing in this Act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws. The substance of this subdivision shall be printed conspicuously upon every immigration visa.

(h) A fee of $9 shall be charged for the issuance of each immigration visa, which shall be covered into the Treasury as miscellaneous receipts.

DEFINITION OF "IMMIGRANT."

SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and

seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

NON-QUOTA IMMIGRANTS.

SEC. 4. When used in this Act the term "non-quota immigrant" means—

(a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under Section 9;

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him;

(d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university; and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him; or

(e) An immigrant who is a bona fide student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn.

EXCLUSION FROM UNITED STATES.

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

(b) If such classes of cases and under such conditions as may be by regulaions prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of Section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3.

(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence, by such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

(e) No quota immigrant shall be admitted under subdivision (d) if the entire number of immigration visas which may be issued to quota immigrants of the same nationality for the fiscal year has already been issued. If such entire number of immigration visas has not been issued, then the Secretary of State, upon the admission of a quota immigrant under subdivision (d), shall reduce by one the number of immigration visas which may be issued to quota immigrants of the same nationality during the fiscal year in which such immigrant is admitted; but if the Secretary of State finds that it will not be practicable to make such reduction before the end of such fiscal year, then such immigrant shall not be admitted.

(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under Section 16.

DEPORTATION.

SEC. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or

to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in Sections 19 and 20 of the Immigration Act of 1917: *Provided*, That the Secretary of Labor may, under such conditions and restrictions as to support and care as he may deem necessary, permit permanently to remain in the United States, any alien child who, when under 16 years of age was heretofore temporarily admitted to the United States and who is now within the United States and either of whose parents is a citizen of the United States.

OFFENSES IN CONNECTION WITH DOCUMENTS.

SEC. 22. (a) Any person who knowingly (1) forges, counterfeits, alters, or falsely makes any immigration visa or permit, or (2) utters, uses, attempts to use, possesses, obtains, accepts, or receives any immigration visa or permit, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or who, except under direction of the Secretary of Labor or other proper officer, knowingly (3) possesses any blank permit, (4) engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, (5) makes any print, photograph, or impression in the likeness of any immigration visa or permit, or (6) has in his possession a distinctive paper which has been adopted by the Secretary of Labor for the printing of immigration visas or permits, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both.

(b) Any individual who (1) when applying for an immigrant visa or permit, or for admission to the United States, personates another or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name, or (2) sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, an immigration visa or permit, to any person not authorized by law to receive such document, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both.

(c) Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both.

BURDEN OF PROOF.

SEC. 23. Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Labor.

ACT TO BE IN ADDITION TO IMMIGRATION LAWS.

Sec. 25. The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this act. An alien, although admissible under the provisions of this act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this act, and an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this act, and an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act.

* * * * * *

TIME OF TAKING EFFECT.

Sec. 31. (a) Sections 2, 8, 13, 14, 15, and 16, and subdivision (f) of section 11, shall take effect on July 1, 1924, except that immigration visas and permits may be issued prior to that date, which shall not be valid for admission to the United States before July 1, 1924. In the case of quota immigrants of any nationality, the number of immigration visas to be issued prior to July 1, 1924, shall not be in excess of 10 per centum of the quota for such nationality, and the number of immigration visas so issued shall be deducted from the number which may be issued during the month of July, 1924. In the case of immigration visas issued before July 1, 1924, the four-

month period referred to in subdivision (c) of section 2 shall begin to run on July 1, 1924, instead of at the time of the issuance of the immigration visa.

(b) The remainder of this act shall take effect upon its enactment.

(c) If any alien arrives in the United States before July 1, 1924, his right to admission shall be determined without regard to the provisions of this act, except section 23.

IMMIGRATION RULES OF MAY 1, 1917.

Rule 22—Arrest and Deportation on Warrant.

Subd. 3. *Application for warrant of arrest.*—The application must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government (except in cases of public charges covered by subdivision 4 hereof), the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an inspector. In all cases shown in subdivision 1 to be subject to a time limitation the application must be accompanied by a certificate of landing (to be obtained from the immigration officer in charge at the port where landing occured, unless entry without inspection within such limitation is confessed, or a reason given for its absence. In the absence of such certificate, effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity, or when some substantial interest of the Government would be subserved thereby, and must state (a) that the usual written application is being forwarded by mail, and (b) the substance of the facts and proof therein contained. The code supplied by the department should be used whenever practicable.

Subd. 5. *Execution of warrant of arrest and hearing thereon.*—(a) Upon receipt of a telegraphic or written

warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the immigration officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served.

(b) At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing, and to offer evidence to meet any evidence presented or adduced by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be presented by him in accompanying brief. If during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to the facts which constitute such reason, and he shall be given an opportunity to show cause why he should not be deported therefor.

(c) At the close of the hearing the full record shall be forwarded to the bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge,

for determination as to whether or not a deportation warrant shall issue.

(d) The record of the hearing accorded an alien who is suffering from any physical or mental disability shall be supplemented by a medical certificate showing (1) whether such alien is in condition to be deported without danger to life; (2) whether he will require special care and attention on the ocean voyage.

IMMIGRATION RULES OF FEBRUARY 1, 1924.

Rule 18—Arrest and Deportation on Warrant.

Subdivision B.—Application for warrant of arrest.

Paragraph 1.—The application must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence. If the facts stated are within the personal knowledge of the inspector reporting the case, or such knowledge is based upon admissions made by the alien, they need not be in affidavit form. But if based upon statements of persons not sworn officers of the Government (except in cases of public charges covered by subdivision C hereof), the application should be accompanied by the affidavit of the person giving the information or by a transcript of a sworn statement taken from that person by an inspector. In all cases subject to a time limitation, the application must be accompanied by a certificate of landing obtained from the immigration officer in charge at the port where landing occurred, unless entry without inspection within such limitation is confessed, or a reason given for its absence. In the absence of such certificate, effort should be made to supply the principle items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity, or when some substantial interest of the government would be subserved thereby, and must state (a) that the usual written application is being forwarded by mail, and (b) the date and place of entry and the substance of the facts and proof therein contained. The code supplied by the department should be used whenever practicable.

* * * * * *

Subdivision D.—Execution of warrant of arrest and hearing thereon.

Paragraph 1.—Upon receipt of a telegraphic or formal warrant of arrest the alien shall be taken before the person or person therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the immigration officer in charge, he may be taken into custody or allowed to remain in some place deemed by such officer secure and proper, except that in the absence of special instructions an alien confined in an institution shall not be removed therefrom until a warrant of deportation has been issued and is about to be served.

Par. 2.—At the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing and to offer evidence to meet any evidence presented or adduced by the Government. Objections of counsel shall be entered on the record, but the reasons for such objections shall be presented in accompanying brief. If during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien shall be notified that such additional charge will be placed against him, and he shall be given an opportunity to show cause why he should not be deported therefor.

Par. 3.—At the close of the hearing the full record shall be forwarded to the bureau, together with any writ-

ten argument submitted by counsel and the findings and conclusions of the examining officer and the recommendations of the officer in charge, for decision of the Secretary of Labor as to whether or not a deportation warrant shall issue.

Par. 4.—The record of the hearing accorded an alien who is suffering from any physical or mental disability shall be supplemented by a medical certificate showing (1) whether such alien is in condition to be deported without danger to life; (2) whether he will require special care and attention on the ocean voyage.

Revised Statutes of Illinois, 1925, Chap. 38, Secs. 587-593.

587. Advocating reformation or overthrow of government by unlawful means. Sec. 265a. *It shall be unlawful for any person openly to advocate, by word of mouth or writing, the reformation or overthrow, by violence or any other unlawful means, of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the constitutions of the several states.

588. Publication, issue, sale, etc., of matter advocating violence against government. Sec. 265b. It shall be unlawful for any person to publish, issue or knowingly sell or distribute any book, paper, document or other written or printed matter which advocates crime and violence, as a means of accomplishing the reformation or overthrow of the constitutional representative form of government so secured to the citizens of the United States and the several states.

589. Organizing or membership in associations advocating reformation or overthrow of government by violence. Sec. 265c. It shall be unlawful for any person to organize, aid in the organization of, or become a member of any society or association, the object of which is to advocate the reformation or overthrow of the existing form of government, by violence or any other unlawful means.

590. Presence at assemblies advocating reformation or overthrow of government by violence. Sect. 265d. It shall be unlawful for any person voluntarily and with knowledge of the purpose of such meeting or assembly to be present at any meeting or assembly at which the reformation or overthrow of the existing form of government, by crime and violence is advocated.

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*The references to Sections 265a and following are to the numbering in the Illinois Criminal Code. These sections were added by the Act of June 28, 1919.

591. Permitting premises to be used by unlawful organization or assembly. Sec. 265e. It shall be unlawful for any person owning, possessing or controlling the use of any room, building or other premises, knowingly to permit the same to be used as the headquarters of any organization which advocates crime and violence or as a meeting place for any meeting or assembly at which crime and violence is advocated, as a means of accomplishing the reformation or overthrow of the existing form of government.

592. Displaying anarchistic flag, etc. Sec. 265f. It shall be unlawful to display or exhibit at any meeting, gathering or parade, public or private, any flag, banner, emblem or other insignia, symbolizing or intending to symbolize a purpose to overthrow by force or violence or by physical injury to person or property of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the Constitution of the State of Illinois.

593. Punishments. Sec. 265g. Any person who shall violate sections 265a, 265b, 265c or 265f of this Act shall be deemed guilty of a felony, and upon conviction therefor shall be punished by imprisonment in the penitentiary for a period of not less than one year nor more than ten years. Any person who shall violate sections 265d and 265e of this Act shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in the county jail for a period of not less than six months nor more than one year, or both.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 111

THE UNITED STATES OF AMERICA EX REL. EMANUEL VAJTAUER, APPELLANT

v.

THE COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF THE UNITED STATES

OPINION BELOW

The opinion of the District Court is not reported, but is found at page 29 of the record.

JURISDICTION

The judgment of the District Court dismissing the writ of habeas corpus was filed April 23, 1925. (R. 3.) On the same day an appeal was taken to this Court (R. 32) under Section 238 of the Judicial Code as it stood prior to the Act of February 13, 1925, c. 229, 43 Stat. 936, on the ground that the case

involves the construction and application of the Constitution of the United States. Two constitutional questions were properly raised below. One was that the order for deportation was made without a fair hearing before the immigration authorities and without any substantial evidence to support it, and that thereby the appellant was denied due process of law in violation of the Fifth Amendment. (R. 3.) Another constitutional question properly raised below (R. 8) was that an inference drawn from the appellant's refusal to answer certain questions asked by the immigration authorities deprived the appellant of the protection against self-incrimination granted by the Fifth Amendment. (R. 8.)

QUESTIONS PRESENTED

The ultimate question is one of fact. It is whether the warrant of deportation was supported by any evidence that the alien at and before entering the United States was one advocating overthrow of governments by force and violence. More narrowly stated, the question is whether there was any evidence before the immigration authorities to support the conclusion that the appellant, who gives his name as Dr. Emanuel Vajtauer, formerly of Prague, Czechoslovakia, who entered the United States in December, 1923, is the same person as Dr. E. Vajtauer or Dr. E. M. Vajtauer, of Czechoslovakia, who at Moscow in 1920 published a pam-

phlet advocating overthrow of governments and capitalism by force and violence.

STATEMENT

This case is here on appeal from a judgment of the District Court dismissing a writ of habeas corpus and remanding this appellant to the custody of the Commissioner of Immigration for deportation. On February 20, 1924, the immigration inspector at Chicago received a communication signed by "A Union Man" stating that "Dr. E. Vajtauer, of Prague, a Czechoslovak Communist Leader and a delegate to the III Inter. Congress in Moscow, 1922, arrived in New York the first week in December, 1923," and asserting that he had entered under false pretense; that he was editor of the Bohemian Communist Daily "Spravedlvost" in Chicago, and that he was inciting the people against the Government. An investigation followed; the District Director recommended the issuance of a warrant of arrest preliminary to deportation proceedings (R. 10); the warrant of arrest issued (R. 11); and the hearing took place (R. 12). The warrant did not charge Vajtauer with having done any act within the United States justifying his deportation. It stopped with charging that "prior to or at the time of his entry" he believed in and advocated the overthrow by force and violence of the Government and all forms of law and that "prior to or at the time of his entry"

he wrote or published written or printed matter advocating overthrow of government. (R. 11–12.)

Section 1 of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008 (set forth at page 23 of the appendix to appellant's brief), provides that aliens "shall be excluded from admission" if anarchists or if they advise, advocate, believe in, or teach the overthrow by force or violence of the Government of the United States or of all forms of law, or if they write or cause to be written matter advocating such doctrines. Section 2 provides "that any alien who, at any time after entering the United States, is found to have been *at the time of entry,* or to have become thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February 5, 1917." These proceedings were based on the assertion that Vajtauer belonged to an ineligible class at the time of entry.

Appellant's name was given in the immigration record as Emanuel Vajtauer, who arrived December 1, 1923, at New York from Antwerp; he was a Slovak and a native of Czechoslovakia, and his last permanent residence abroad was Prague, Czechoslovakia; his father's name was Filip Vajtauer. (R. 10.)

His first hearing took place May 14, 1924. While immigration rules adopted May 1, 1917 (Rule 22,

subdivision 5, paragraph (b), page 37, of Appendix to appellant's brief), provided that "at the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued and shall be apprised that he may be represented by counsel," the rules effective February 1, 1924, more than three months prior to the hearing, provide (Rule 18, subdivision D, paragraph 2, page 40, Appendix to appellant's brief) "at the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and shall be apprised that he may be represented by counsel." The rule in force three months before this hearing therefore eliminated the provision that at the beginning of the hearing the alien shall be allowed to inspect the evidence on which the warrant of arrest was issued. In the footnote to appellant's brief, at page 32, an attempt is made to convey the impression that this hearing was conducted under the old rule. The alien's counsel may have thought the old rules were in force, but the immigration officer did not. The new rules had been in force, circulated, and distributed for more than three months, and the printed form used by the inspector at this hearing in propounding the preliminary questions is based on the rule of February 1, 1924; deals with inspection of a warrant and representation by counsel, but omits any reference to preliminary inspection of the evidence on which the warrant was based.

(R. 13.) The alien was represented by counsel. He stated that he read the warrant and fully understood the nature of the proceeding, and his counsel stated he was ready to proceed. No request was made that the evidence on which the warrant was issued should be submitted for inspection. The alien was then sworn, gave his name as Emanuel Vajtauer, his occupation as "Doctor of Psychology," and editor of the "Spravedlvost," a Bohemian newspaper in Chicago; that he was a citizen of Czechoslovakia by birth, and that his wife remained at Prague. (R. 13–15.)

The next question propounded was "Why did you come to the United States?" The alien's attorney said, "I will advise the alien not to answer *any further questions* until the evidence upon which the warrant is based will be presented here." (R. 15.) The alien stated he would go by his attorney's advice and thereafter refused to answer any more questions of any character. The immigration inspector produced and offered in evidence a pamphlet bearing the name of "Dr. E. M. Vajtauer" as author (R. 15), entitled "Revolution and the Dictatorship of the Proletariat by Dr. E. Dajtauer, written in Moscow in the Spring of 1920" (R. 18). This pamphlet contained such statements as "Only when you kill the bourgeois-capitalist, only then you will be free. By this kind of primitive logic it is usually necessary to lead the revolting soldier, in order that he should not unnecessarily sacrifice himself and others. * * * During the attack, the

revolution must be merciless. It must destroy the old system, not leaving even a single stone unturned. * * * The people, who suffered too long, will knock to the ground the socialist traitors and bourgeois, and will punish with death any attempt of resistance. They have a right to do that. Others have killed millions of their brothers previously." The question was then asked the alien "Is that your name at the head of the pamphlet?" His attorney responded "I have instructed the alien not to answer any questions until the entire evidence upon which the warrent is based will be presented." (R. 15–16.) He was asked if he was the author of certain passages and his attorney responded "I have instructed him not to answer any questions at this hearing until the evidence is presented." At no time was any suggestion made that the alien was claiming the privilege against self-incrimination or that his admission that he was the author of an incendiary pamphlet in Russia had any tendency to establish the commission of a crime in the United States. On the contrary his refusal to testify was expressly explained on another ground.

A copy of a semiweekly newspaper published by the Slovak Labor Socialist Federation of America in Chicago was then produced by the immigration inspector (R. 16), in which appeared what purported to have been a speech delivered by Dr. Vajtauer, editor of the Bohemian Daily "Spravedlvost." The alien was asked if he had delivered a speech at the Spravedlvost Hall on March 21,

1924, and his attorney said "I shall advise him not to answer." (R. 17.) The reported speech of March 21, 1924 (R. 20–21) predicted war between the United States and the proletariat countries of Europe fighting against "capitalistic America," and said, "then the proletariat of America would find itself in the position, either to fight the proletariat of Europe, or else fight against its own capitalists, and it is up to the conscientious leaders of the proletariat to prepare the workers for this fatal moment." The inspector then produced an abridged report of meetings at Petrograd and Moscow in November and December, 1922, of the Fourth Congress of the Communist Internationale, published by the Communist Party of Great Britain, 16 King Street, Covent Garden. (R. 17.) In that was a report of a speech made at the meeting by "Dr. Vajtauer, Czecho-Slovakia." The alien was asked if he was the author of these remarks at the convention at Moscow, and his attorney advised him not to answer. (R. 18.) The inspector then announced, "This is the Government's case. Do you desire to introduce any testimony?" and the alien's attorney stated, "I desire to peruse the exhibits before I will decide whether I will permit the respondent to testify," and the hearing ended.

The alien had been released on bond after his arrest, and after his first hearing was released upon the same bond. (R. 18.) He has not been held in custody by virtue of the warrant of arrest since giving these bonds and his detention is now based on

the warrant of deportation and upon his bond to appear, and not upon the original warrant of arrest.

Subsequently to the first hearing there was passed the immigration act of 1924, approved May 26, 1924, c. 190, 43 Stat. 153, which provided in Section 23 as follows (p. 165):

> Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Labor.

Thereupon, and on the assumption that this statute had shifted the burden of proof to the alien to show that he had been lawfully admitted, the hearing of the deportation proceedings was reopened on August 27, 1924. (R. 21.) Section 23 of the new statute was read to the alien and to his attorney, and the attorney was asked if he "desired to place the alien under oath and permit his examination," and the answer was, "No, I will file a supplemental brief in ten days or two weeks." Thereupon the immigration inspector recommended deportation, finding that he belonged to

the radical classes excluded by the statute. The district inspector concurred in the recommendation. (R. 23–24.) The Board of Review concluded that there was affirmative evidence and recommended deportation, and its conclusion was not based on the rule of burden of proof established by the immigration act of 1924. The Acting Secretary of Labor thereupon made a finding that this alien "prior to or at the time of his entry" believed in the overthrow of government by force and violence, and "prior to or at the time of his entry" had written or circulated printed matter advocating such doctrines, and a warrant of deportation was issued. (R. 27.) A writ of habeas corpus was then applied for, and on the hearing the District Court held, first, that Section 23 of the Act of 1924 cast the burden on the alien to show that he had entered lawfully in the sense of being one lawfully entitled to enter, and also suggested because of his failure to assert his constitutional privilege in terms an inference could be drawn from his refusal to answer, affording affirmative evidence against him.

SUMMARY OF ARGUMENT

I. In reviewing deportation proceedings on *habeas corpus* the courts consider only whether through denial of a fair hearing, due process was denied. That the evidence would have been insufficient in a court of law or that it was not legal or competent evidence does not establish denial

of a fair hearing. The real question before the immigration officials was one of identity between this alien and the author of the Moscow pamphlet and the delegate at the Communist Convention at Moscow. On the assumption that the burden of proof was not on the alien, there was some evidence to support the finding of the immigration officials. Identity of names is sufficient to establish identity of persons in the absence of any circumstances casting doubt on identity. The lack of complete identity of names in this case through the presence of a middle initial in one of them is remedied by other circumstances pointing to identity.

An inference of identity was properly drawn through the alien's refusal to answer questions as to his identity. This refusal was not based on the claim that the answer would incriminate him, but on the ground that he had a right to see the Government's case before testifying. His refusal to answer was broader than the constitutional privilege, because it related to all questions, whether incriminating or not. To prevent compulsion of testimony the privileged individual must assert the constitutional privilege. If the drawing of an inference is compulsion, then to prevent that form of compulsion the privilege must be asserted. The inference from silence in this case is conclusive unless the drawing of the inference is forbidden because of the incriminating character of the questions. The necessity for asserting the constitutional privilege in terms appears because the immigration officials

guided the course of the hearing on the assumption that an inference could be drawn from silence in the absence of any suggestion or claim that the questions asked were incriminating. If that assertion had been made the immigration authorities, instead of relying on the inference, might well have produced other evidence. After the hearing was closed and deportation ordered and the matter reached the courts, it was too late to raise the claim of privilege under the Fifth Amendment. It is not settled that the inference could not be drawn even if the privilege had been claimed.

II. The meaning of Section 23 of the immigration act of 1924, relating to burden of proof, is a matter not free from doubt. The exact question is what is meant by the requirement that the alien must show "that he entered the United States lawfully." If by lawful entry is meant entry by one lawfully entitled and qualified to enter, this alien failed to sustain the burden of proof. But if by lawful entry is meant merely entry openly, under inspection of the immigration authorities, without regard to whether the alien belonged to an excluded class, the appellant did sustain the burden of proof as to that, as it appeared he entered with a passport and under inspection of the immigration authorities.

Looking alone at the language of the statute, the conclusion would be that in deportation proceedings the burden is on the alien to show that he entered lawfully in the sense of being one lawfully entitled to enter and not one whose entry was forbidden. If reference to congressional debates is to be re-

sorted to, doubt arises as to what Congress actually intended by this statute, since there is much in the debates to indicate that lawful entry was understood only to mean entry under form of law and under inspection of the immigration authorities.

III. The miscellaneous arguments presented by the appellant are make-weights and without substance. The hearing was fair in every respect. Neither the statute nor the regulations required that the evidence on which the warrant of arrest had been issued should be subjected to the inspection of the alien and he did not request it. The warrant contained a clear statement of the charges and it was exhibited to the alien, who was represented by counsel and who consented to proceed. Any irregularities in the warrant of arrest as justifying detention were waived when the alien gave bond to appear. In its function as a statement of the charges against the alien, the warrant was sufficient.

ARGUMENT

I

THERE WAS EVIDENCE TO SUPPORT THE FINDING OF THE IMMIGRATION OFFICERS THAT THE APPELLANT AT THE TIME OF HIS ENTRY BELONGED TO AN EXCLUDED CLASS. THAT THE EVIDENCE WOULD HAVE BEEN INSUFFICIENT OR INCOMPETENT IN A COURT OF LAW DOES NOT ESTABLISH DENIAL OF A FAIR HEARING

We deal with this question on the assumption that the burden of proof rested upon the immigra-

tion authorities. It is settled that the common-law rules of evidence are not controlling in deportation hearings and that any evidence which has some basis for credibility may be accepted. In reviewing such proceedings on *habeas corpus* the courts only consider whether due process has been denied, because a fair hearing has been denied. That the decision of the immigration officers may have been erroneous, or that the evidence would have been insufficient in a court of law or that it was wrongly decided that evidence introduced was legal evidence, or that wrong inferences were drawn from it, do not establish denial of a fair hearing. *United States ex rel. Tisi* v. *Tod,* 264 U. S. 131.

There was put in evidence the Moscow pamphlet of 1920 and the record of the proceedings of the Communist Convention in Moscow in 1922. The pamphlet was written by "Dr. E. M. Vajtauer" or "Dr. E. Vajtauer." (It can not be certain which. R. 15, 18.) The delegate at the Communist Congress was "Dr. Vajtauer from Czechoslovakia." The alien was Dr. Emanuel Vajtauer, formerly of Prague. Aside from the similarity or identity of names was the fact that the alien, as well as the author of the pamphlet and the delegate at the Convention were "Doctors." The alien did not leave Europe until 1923, and therefore may have been in Moscow at the time the pamphlet was written and the Convention took place. The alien was from Prague and the delegate at the Communist Convention was from Czechoslovakia. Identity of

names is sometimes sufficient proof of identity of persons in the absence of any circumstances throwing doubt on the identification. This presumption is sometimes indulged in where there are related transactions.

Stebbins v. *Duncan*, 108 U. S. 32.
Morris v. *McClary*, 43 Minn. 346.

It is also applied under other circumstances.

Colbert v. *State*, 125 Wis. 423.
State v. *McGuire*, 87 Mo. 642.
Ayres v. *Ratshesky*, 213 Mass. 589.
State v. *Miller*, 80 Wash. 75.
Hatcher v. *Rocheleau*, 18 N. Y. 87.

The presence of a middle initial in one case and its absence in the other case does not obliterate the inference of identity. *Hunt* v. *Stewart*, 7 Ala. 525; *Union Drainage District, No. 3*, v. *Ullrich*, 273 Ill. 165. The weight of the inference to be drawn from the identity of names depends upon the facts and circumstances of the particular case. In the present case there was not an exact identity of names disclosed by the record. The alien's name was given as Dr. Emanuel Vajtauer; that is to say, *he* gave it as Emanuel Vajtauer. (R. 10, 13.) The name of the author of the Moscow pamphlet of 1920 is given in the record as Dr. E. M. Vajtauer (R. 15) in one place and as Dr. E. Vajtauer in another (R. 18). Assuming that "E. M." is right, striking out the period after "E" would leave the name "EM. Vajtauer," an abbreviation for Emanuel Vajtauer. This slight discrepancy in the name

is more than made up by other significant circumstances. All the Vajtauers mentioned are "Doctors." The alien is a "Doctor of Psychology" (R. 13) and editor of a Bohemian newspaper. The author of the pamphlet and the delegate at the Moscow Convention were evidently Doctors in the sense of being intellectuals. Identity of residence was practically established. The Dr. Vajtauer who wrote the pamphlet wrote it in Moscow in 1920, and in 1922 Dr. Vajtauer of Czechoslovakia was in Moscow and a delegate to the Communist Convention. The alien's personality, training, and occupation showed him to be of the type who write such pamphlets and attend such conventions. The word "Spravedlvost," the name of his newspaper, means "Justice." The Federal decisions cited by appellant (his brief, p. 34) to support the claim that identity of names is of no weight in immigration cases, are cases where Chinese claimed that identity of their names with those to whom certificates of discharge had been issued, should be conclusive, although in some the identity of name depended on the Chinese testimony, and in some other circumstances cast doubt on the alleged identity. Applying ordinary judgment and common sense to this case, and having in mind that the immigration officers had no presumptions to overcome (*Bilokumsky* v. *Tod*, 263 U. S. 149), the conclusion is inevitable that enough was produced at his hearing to put upon this alien the burden, for the purposes of an administrative hearing, of raising some doubt or

proving some circumstance to shake the inference of identity. Added to that was his refusal to testify. His brief asserts that his refusal to testify was because he had not been allowed at the beginning of the hearing to inspect the evidence on which the warrant of arrest was issued, as provided by an immigration rule of May 1, 1917, which was abrogated more than three months before the hearing. Under the old rule that inspection would have been allowed at the same time the warrant was exhibited and he was asked whether he had counsel to represent him. The form of procedure adopted by the inspector shows he was proceeding under the new rule, which did not require an offer of such inspection (R. 13), and it is clear that at the beginning of the hearing no request for inspection was made. His refusal to testify was explained by the statement of his counsel that the alien would not answer any questions until the evidence upon which the warrant is based "will be presented." The grounds assigned for refusal were insufficient. In that respect the case is like *State* v. *Skillman*, 76 N. J. L. 464, where the accused, instead of standing on his right not to testify, called witnesses to prove he was too sick to testify, and the court held that if the jury found the fact of sickness against him they were justified in inferring that he could not truthfully deny the charge. No suggestion of self-incrimination was made. The refusal was not to answer incriminating questions but all questions,

whether incriminating or not, and the reason specifically assigned was that the alien considered he should not be required to answer any further questions until he had judged the strength of the Government's case. If an inference may be lawfully drawn from the alien's refusal to state whether he was the author of the Moscow pamphlet, that inference must be that the answer, if true, would have exposed him to immediate deportation. *Bilokumsky* v. *Tod,* 263 U. S. 149.

Authorities conflict as to whether drawing an inference from silence infringes the privilege against self-incrimination. (*Andrews* v. *Frye,* 104 Mass. 234; *Morgan* v. *Kendall,* 124 Ind. 454; *State* v. *Bartlett,* 55 Me. 200.) The question was expressly reserved in *Twining* v. *New Jersey,* 211 U. S. 78. Deportation proceedings are civil, and the Federal statute providing that failure to testify shall create no presumption relates only to criminal cases (Act of March 16, 1878, c. 37, 20 Stat. 30), so that if the inference be prohibited in civil cases in Federal courts it is because of the Fifth Amendment. In *Bilokumsky* v. *Tod,* 263 U. S. 149, the opinion (p. 154), before approving an inference from silence, pointed out that the matter was not incriminating.

The question is one requiring full investigation and it seems unnecessary to decide it here.

Some questions asked Vajtauer respecting his conduct in the United States may have had an obvious tendency to draw out self-incriminating

answers connected with the commission of some offense against the Illinois statute referred to in the appellant's brief. It was not pointed out how an admission that in 1920 he wrote the pamphlet in Moscow and in 1922 attended the Communist Convention in Moscow connected him with the commission of any offense in Illinois, and certainly, since he expressly assigned another ground for silence, there was nothing about those questions or his refusal to answer which would direct the attention of the immigration officials to the idea that the answers to those questions might incriminate and were refused on that ground.

It is well settled that the constitutional privilege must be claimed, and that if not claimed it is waived. *United States* v. *Skinner,* 218 Fed. 870; *United States* v. *Elton,* 222 Fed. 428; *Taylor* v. *United States,* 152 Fed. 1, 7. In most of these cases the testimony was given and not refused, but if the claim of privilege under the Constitution must be asserted to avoid compulsion, and if the drawing of the inference from silence is compulsion, then the constitutional privilege must be claimed and asserted to avoid the inference. In this case the refusal to answer was based on the ground that the witness had not been accorded a right under an immigration rule which had been abrogated. Refusal to answer upon the ground that the witness has not been accorded a right to which he is not entitled rises no higher than silence. A constitutional privilege is

waived as much by silence as by spoken answers. Both are evidence voluntarily given without claim of constitutional privilege.

If, upon his refusal, contempt proceedings had been instituted in a Federal Court, Vajtauer could not have escaped compulsion by the reason for refusal which he had asserted. The immigration officers therefore had the right to conclude that no contempt proceedings were necessary, as they could obtain as good a result by drawing the inference.

Furthermore, his failure to assign the privilege against self-incrimination as the ground for refusal and the assertion of an entirely different ground, diverted the immigration authorities from any idea that the answers might incriminate and that the alien was claiming the constitutional privilege, and induced the officials to the conclusion that they had a right under the doctrine of the *Bilokumsky case* to draw an inference from silence and the hearings were conducted and closed on that theory. If the constitutional point had been raised the immigration authorities would have been warned that no inference might be drawn from silence, and might have conducted the hearings on that assumption and provided other testimony. *United States* v. *Skinner,* 218 Fed. 870, 878–9. *United States* v. *Lay Fish Co.,* 13 F. (2nd) 136. These are immunity cases, but the principle is found in them.

The question for a court is whether the hearing was fair. The case must be judged on the record

as it stood before the immigration officials, and if they had a right owing to the conduct of the alien at the hearing to assume that an inference could lawfully be drawn from his silence, that inference constituted testimony which, with the other circumstances in the case, pointed conclusively to the identity of this alien with the Dr. Vajtauer mentioned in the exhibits.

If they committed error in holding they had a right to draw an inference from his refusal, that error does not establish denial of a fair hearing. *United States* v. *Tod, supra.*

II

INTERPRETATION OF SECTION 23 OF THE IMMIGRATION ACT OF 1924 RELATING TO BURDEN OF PROOF

The first hearing occurred before the passage of this statute. After its passage the case was reopened, the statute was called to the attention of this alien and his counsel, and an opportunity given to him to sustain the burden of proof supposed to have been imposed upon him by the statute. The question involved relates to the meaning of the phrase "entered the United States lawfully" in that provision of the statute which provides that—

> in any deportation proceeding against any alien, the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the admission, place, and manner of such entry into the United States, but in presenting such proof he shall be en-

> titled to the production of his immigration visa, if any, or of any other documents concerning such entry in the custody of the Department of Labor.

The immigration laws forbid the entry of aliens of certain classes entertaining disapproved theories relating to the overthrow of governments by force and violence. They forbid and make unlawful the entry of aliens having various defects, mental or physical. In one sense an alien who belongs to an excluded class and whose entry is forbidden enters the United States unlawfully, even though he comes openly and his defects escape the attention of the immigration officials. The contention of the appellant is that an unlawful entry within the meaning of Section 23 is a clandestine entry, or possibly one obtained by fraud or misrepresentation or false papers, and that one who enters openly under inspection of the immigration authorities and without committing any unlawful act to obtain entry has not entered unlawfully, although his entry may have been forbidden in that he may have belonged to an excluded class and concealed his defects rather than misrepresented his qualifications. Looking at the statute alone, such an interpretation would require rejection, but a resort to the Congressional Record raises a doubt as to what Congress intended by this statute. If the language of the statute is clear, no such resort should be made. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 588. This

seems to be a case where the doubt as to the meaning of the statute arises, not before, but after examination of the Congressional Record. The discussion contained in the Congressional Record set forth in the appellant's appendix to his brief shows more ambiguity and uncertainty as to what the legislators thought the statute meant than is disclosed on the face of the statute itself. The section as reported by the Committee read as follows:

> SEC. 23. In any proceeding under the immigration laws the burden of proving the right of any alien to enter or remain in the United States shall, as between him and the United States, be upon such alien.

As this stood, it placed on the alien the burden to show not only that he had entered lawfully and that he was eligible for admission at the time of entry, but also that after he had arrived in the United States he had not become disqualified by any misconduct or activities here, and the significance of this is illustrated by Section 2 of the Act of October 16, 1918, as amended by the Act of June 5, 1920, found on pages 24 and 25 of the Appendix to appellant's brief, which provides that any alien who at any time after entering is found to have been at the time of entry *or to have become thereafter* a member of "any of the excluded classes" shall be deported. The amendment placing Section 23 in the form in which it now stands was proposed by Mr. Begg. Mr. Begg had the idea that his amend-

ment did not apply to any alien after he had been admitted. In this he was clearly wrong, because it does apply to an alien within the United States after admission, even if it only requires him to show that he came in openly under forms of law. Congressman Newton, a clear-headed lawyer, drew the palpably justified conclusion that Mr. Begg's amendment had the effect only of relieving an alien in deportation proceedings from showing good conduct here in America but left him with the burden of proof to show "that he was lawfully entitled to enter" in the sense of being qualified to enter. (Page 10, Appendix to appellant's brief.) The general trend of the discussion indicates an impression in Congress that lawful entry, as that term is used in the statute, did not relate to the question of qualification through circumstances arising abroad, but there was a sharp difference of opinion as to what the amendment of Mr. Begg meant and whether it should be adopted or the Committee draft should stand, and the final vote in the House after division was 140 to 131 in favor of the Begg amendment. It may well be that some of the legislators voted for the amendment because of the belief that it meant what Congressman Newton said it did and not what others believed it did. The discussion in the Senate is also obscure as to what was meant by the phrase "entered lawfully." Owing to these obscurities in the Congressional Record, the question should be determined from the

terms of the statute itself. Some slight support for the appellant's interpretation of the statute is found in Section 19 of the immigration act of February 5, 1917, c. 29, 39 Stat. 874, 889, which reads as follows:

> That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property * * * shall be deported.

In this it will be noted treatment of cases of entry of disqualified aliens is separated from entry of aliens who have entered in violation of law, from which the inference may be drawn that if entry made in violation of law related to entry of disqualified aliens rather than clandestine or fraudulent entries, it would not have been necessary to deal specifically with entry of those in excluded classes.

There is something to be said in favor of the interpretation of Section 23 urged by the appellant. The question is not free from difficulty, and in view of what the Congressional Record discloses, we hesitate to insist upon an interpretation favorable to the United States in this case, although we are not prepared to concede that the District Court

was wrong on this question. If we are correct in the contentions contained in paragraph 1 of this brief, the interpretation of Section 23 of the Act of 1924 will not have to be dealt with by the Court.

The contentions that Section 23 applies only to deportation proceedings against aliens entering after the passage of the act of 1924, or that to apply this statute as the District Court applied it raises any grave constitutional question are not substantial. *Yee Hem* v. *United States,* 268 U. S. 178.

III

MISCELLANEOUS CONTENTIONS OF THE APPELLANT

Under Point 7 of his brief appellant makes a number of complaints as to the irregularity of the proceedings of the immigration officers and as to violation of Labor Department rules, which require little consideration as they are merely make-weights. The attack on the proceedings preliminary to the warrant of arrest has obvious answers. The warrant of arrest serves two purposes: First, to take the alien into custody, and, second, to furnish an information or bill of complaint stating the charges against him, so that he may know what he has to meet at the hearing. As a warrant of arrest, probable cause supported by oath or information may be necessary, but after the warrant is executed and arrest is made and the alien gives bond to appear, the warrant has performed its

office in that respect, and the detention is no longer by virtue of the warrant of arrest, and whether it was regularly issued on probable cause supported by oath becomes immaterial. *State* v. *Queen,* 66 N. C. 615; *Ard* v. *State,* 114 Ind. 542; *Mahler* v. *Eby,* 264 U. S. 32. As to the form of the warrant and its sufficiency to advise the alien of the charges against him, no complaint is made and, if made, would be unfounded, as the warrant clearly and specifically stated just what the ground for threatened deportation was.

CONCLUSION

We have here the case of an alien invoking the protection of the benign provisions of the Constitution of the United States to enable him to avoid deportation by suppressing the fact that he is an enemy of that Constitution. No one can read this record without being convinced that under the rules applicable to administrative hearings, enough circumstances were produced before the immigration inspector to shift to this alien the burden of asserting or establishing that he was not the author of the incendiary document exhibited. If added to this, it is allowed to draw the inference of identity from his silence, the conclusion of the immigration officials may not be questioned. Bearing in mind that the courts may not pass on the weight or sufficiency of evidence before the immigration authorities and are confined to an inquiry as to

whether there was a fair hearing and due process of law, the conclusion should be that there is no ground for interfering with the action of the immigration authorities in ordering the appellant's deportation.

Respectfully submitted.

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NOVEMBER, 1926.

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